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IN THE

Supreme Court of the United States

UNITED ARAB EMIRATES and
THE EMBASSY OF THE UNITED ARAB EMIRATES,

Petitioners,

v.

MOHAMED SALEM EL-HADAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*, establishes a general rule of immunity from suit for foreign states, but contains an exception for "actions based upon a *commercial activity* carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2) (emphasis added). The question presented in this case is whether a foreign nation has engaged in a "commercial activity" for purposes of this exception, thus making it subject to suit under state law for wrongful discharge and defamation, because the plaintiff performed a job within the foreign state's embassy that is similar in some respects to jobs that can be found in the community at large, even though that individual did not, in any respect, engage in "commerce," *i.e.*, "the buying and selling of goods."[1]

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1. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 285 (2d college ed. 1982).

PARTIES TO THE PROCEEDING

Mohamed Salem El-Hadad, the plaintiff in the trial court and the respondent here, formerly was employed by, and later sued, the United Arab Emirates and The Embassy of the United Arab Emirates.

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The United Arab Emirates and The Embassy of the United Arab Emirates ("petitioners" and, collectively, the "UAE") respectfully pray that a writ of *certiorari* issue to review a final judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

In the district court, petitioners moved to dismiss this lawsuit, asserting, *inter alia*, immunity under the Foreign Sovereign Immunities Act ("FSIA" or "Act"). The district court denied the motion in a published decision, *El-Hadad v. Embassy of the United Arab Emirates*, 69 F. Supp. 2d 69 (D.D.C. 1999), which is reproduced in the Appendix ("Pet. App.") at Pet. App. 94a-125a.

On interlocutory appeal, the United States Court of Appeals for the District of Columbia Circuit reversed in part and remanded. That decision is officially reported, *El-Hadad v. United Arab Emirates*, 216 F.3d 29 (D.C. Cir. 2000), and is also reproduced at Pet. App. 79a-93a. On remand, the district court found that the FSIA's "commercial activity" exception applied, reaffirmed its decision to deny immunity and, following a bench trial, awarded the plaintiff damages. The unreported decision on remand, *El-Hadad v. Embassy of the United Arab Emirates*, No. 96-1943 (D.D.C. July 16, 2001), is reproduced at Pet. App. 70a-78a; the unofficially reported trial decision, *El-Hadad v. Embassy of the United Arab Emirates*, No. Civ.A. 96-1943, 2006 WL 826098 (D.D.C. Mar. 29, 2006), is reproduced at Pet. App. 23a-69a.

The UAE appealed. The court of appeals affirmed the decision of the district court with respect to the issue of immunity, and reversed and remanded on the issue of damages. That decision is officially reported, *El-Hadad v. United Arab Emirates*, 496 F.3d 658 (D.C. Cir. 2007), and is reproduced at Pet. App. 1a-22a.

The UAE petitioned for rehearing *en banc* with respect to the immunity issue on August 27, 2007. The court of appeals' order denying the UAE's petition, entered on September 21, 2007, is reproduced at Pet. App. 126a-127a.

STATEMENT OF JURISDICTION

The district court determined that it had jurisdiction pursuant to 28 U.S.C. §§ 1330, 1391, 1441 and 1602-1611, a determination that remains in dispute. The court of appeals issued its opinion on July 27, 2007. The UAE timely petitioned for rehearing *en banc* on August 27, 2007, which was denied on September 21, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The FSIA was enacted in 1976 and is codified at 28 U.S.C. §§ 1602-1611.[1] The statutory provisions relevant to this petition are reproduced *infra* at page 17. Relevant excerpts from the legislative history thereto are reproduced at Pet. App. 128a-132a.[2]

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1. Act of October 21, 1976, Pub. L. No. 94-583, 1976 U.S.C.C.A.N. (90 Stat. 2891) 2891 (codified at 28 U.S.C. §§ 1602-1611).

2. See H.R. REP. No. 94-1487, *reprinted in* 1976 U.S.C.C.A.N. 6604 *et seq.*, for an extended version of the House Report in the legislative history to the FSIA.

STATEMENT

The court of appeals' opinion below exacerbates a pre-existing division of authority among the courts of appeals on a recurring question relating to the sovereign immunity of foreign states and the degree to which states and localities are entitled to impose their own legislative policies on the internal affairs of foreign governments. The district court held, and the court of appeals confirmed, that petitioners in this case, the government of the United Arab Emirates and its Embassy in Washington D.C., were liable for damages under the common law of the District of Columbia because they terminated the employment of respondent, a senior official brought here by the UAE from Abu Dhabi to help administer one of the UAE's governmental programs. Both courts also held that respondent was entitled to recover for allegedly defamatory remarks made entirely within the confines of the UAE's Embassy to respondent's former co-workers by a senior UAE official. This result was based on the conclusion that both the defamatory acts and respondent's employment relationship constituted "commercial activities" and thus fell within an exception to the general rule of sovereign immunity established by the FSIA.[3]

The court of appeals acknowledged below that the lower courts have adopted irreconcilable standards for identifying "commercial activities." It also recounted the

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3. This was in part the basis for the district court's determination that it had jurisdiction pursuant to 28 U.S.C. §§ 1330, 1391, 1441 and 1602-1611, which as noted in the Statement Of Jurisdiction is a determination that remains in dispute.

observation, made by this Court and echoed repeatedly in the lower courts, that the statutory text at issue is circular and provides little in the way of intelligible guidance, and that the meager legislative history on the subject is similarly opaque in many respects. Nonetheless, the court understood that it did "not have the option to throw up [its] hands," but rather was obliged to accept the "judicial responsibility to determine what a 'commercial activity' is for purposes of the Act." Pet. App. 89a.

Indeed, in drafting the FSIA, Congress purposefully ceded a "great deal of latitude" to the courts to establish a standard for identifying "commercial activities" that would be easy to understand and apply, and would give foreign nations and those with whom they interact a reliable basis for arranging their affairs. Pet. App. 132a. It viewed the FSIA as necessary precisely because then-existing "U.S. law [did] not . . . provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity." Pet. App. 129a. Three decades of litigation have resulted in disagreement and uncertainty, not "firm standards." The courts of appeals have adopted modes of analysis that are facially incompatible in many respects. Moreover, even where courts purport to be applying the same standard, identical factual scenarios result in irreconcilable decisions. Uncertainty in the law is always unwelcome, but is especially pernicious in this case because the consistently broad sweep given the commercial activity exception has given both courts and legislative bodies at all levels extraordinary authority to inject themselves into the internal affairs of foreign nations. A writ of *certiorari* is required to rectify this untenable state of affairs.

FACTUAL AND PROCEDURAL BACKGROUND

1. Respondent Mohamed Salem El-Hadad came to Washington D.C. in 1993 at the invitation of the United Arab Emirates to take a job at the UAE's Embassy as the senior official responsible for auditing a specific program funded by the UAE. Before taking this job, El-Hadad, an Egyptian citizen, had performed similar auditing work for the UAE's Ministry of Education in Abu Dhabi for more than a decade. Pet. App. 25a.

While working at the Embassy in Washington, supervising a team of eight or more auditors, El-Hadad identified what he believed to be "financial improprieties in the embassy's cultural attaché's office." Pet. App. 27a. He reported his discovery to the Assistant Minister of Education in Abu Dhabi. *Id.* After hearing of El-Hadad's complaints, the UAE's Minister of Finance and Industry traveled from Abu Dhabi to Washington to meet personally, and secretly, with El-Hadad about the details of his discovery. *Id.* Thereafter, the Embassy's Cultural Attaché, his deputy, and three other Embassy employees were dismissed for cause. Pet. App. 28a.

In the wake of the ensuing investigation, however, the UAE's State Audit Institution also recommended that El-Hadad be dismissed for several identified infractions of his own. Pet. App. 28a-29a. This recommendation was subsequently accepted by the UAE Minister of Higher Education and Scientific Research (El-Hadad's boss in the UAE), and the decision was effectuated by formal Ministerial decree No. 257, on November 16, 1995. Pet. App. 29a-31a.

2. Thereafter, El-Hadad's fate became the subject of political machinations, both in Abu Dhabi and within the Embassy. The UAE's Ambassador to the United States, its Minister of Finance, and the Embassy's new Cultural Attaché all wrote letters to the Ministry of Higher Education and Scientific Research attempting to reverse the latter Minister's decision to terminate El-Hadad. Pet. App. 32a. The Finance Minister complained that El-Hadad had become an innocent casualty of long "existing [political] disputes between the Cultural Attaché [office] in Washington and the Administrative and Financial Affairs Division at the Ministry of Higher Education and Scientific Research" (Pet. App. 33a), and argued that El-Hadad was being unfairly punished because of these internecine bureaucratic battles. Notwithstanding the support shown for El-Hadad at the highest levels of the UAE's government, the Ministry of Higher Education and Scientific Research refused to rescind the termination. Pet. App. 33a-34a.

3. El-Hadad sued the UAE, its Washington Embassy, and three UAE Ministers for breach of contract and defamation in the United States District Court for the District of Columbia. He alleged that UAE governmental regulations applicable to various Embassy employees gave him an enforceable contract under District of Columbia law. His defamation claim was based on statements about his termination made by a high-ranking Embassy official to members of the Embassy's staff, statements made in response to the turmoil created at the Embassy by El-Hadad's departure. All of the events underlying both causes of action occurred entirely

on foreign soil (*i.e.*, either in Abu Dhabi or at the UAE's Embassy in Washington).[4]

4. All of the defendants moved to dismiss the lawsuit for lack of personal jurisdiction and on sovereign immunity grounds. The district court dismissed the claims against the three UAE Government ministers for lack of personal jurisdiction but concluded that it had personal jurisdiction over the UAE and its Embassy. Further, the court held that El-Hadad's employment relationship with the UAE was "commercial activity carried on in the United States by the foreign state" within the meaning of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1610(a)(2), and thus that the UAE and Embassy were not entitled to immunity under that Act. In reaching that conclusion, the court applied what purported to be a bright standard: immunity in employment cases, the court held, applies only when the employee involved is a national of the sovereign defendant. Pet. App. 106a-107a. El-Hadad is Egyptian, and the court concluded that, as a matter of law, the employment of such third-country nationals within the United States is invariably "commercial activity." *Id.*

5. The UAE and its Embassy took an interlocutory appeal. The District of Columbia Circuit reversed the district court in part and remanded. Although an employment relationship is less likely to be "commercial

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4. For FSIA purposes, embassies are treated as foreign soil. *See Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1517 (9th Cir. 1987) (Mexican Consulate is a "foreign state" under the Act); *see also Berdakin v. Consulado de la Republica de El Salvador*, 912 F. Supp. 458, 461 (C.D. Cal. 1995) (same with respect to the Consulate of the Republic of El Salvador).

activity" if the employee at issue is a citizen of the foreign state, the court of appeals held, third country nationality is not dispositive as to the "commercial activity" exception to the general rule of immunity. Pet. App. 75a-77a.

Rather, the court held, in the employment context, application of the "commercial activity" exception turns on a variety of factors. Although the statute does not meaningfully define the phrase "commercial activity," [5] the court focused on the House Report for the bill that ultimately became the FSIA, which suggests that a foreign state does not engage in "commercial activity," *inter alia*, when it employs diplomatic, military, or "civil service" personnel. Pet. App. 85a-86a, 131a-132a. In the context of this case, then, the court held that on remand, the district court should consider, at a minimum, these questions:

- First, how do the UAE's own laws define its civil service, and do Mr. El-Hadad's job title and duties come within that definition?

- Second, what was the nature of Mr. El-Hadad's employment relationship with the U.A.E? Did he have a true contractual arrangement, or is his "contract" claim instead based, as the UAE contends, solely upon the civil service laws of the UAE?

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5. "Commercial activity" is defined as "either a regular course of commercial conduct or a particular commercial transaction or act." Further, "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

- Third, what was the nature of Mr. El-Hadad's employment relationship when he worked in the UAE, and how did his subsequent employment at the Embassy relate to that prior tenure?

- Fourth, what was the nature of Mr. El-Hadad's work?

- Fifth, what is the relevance of Mr. El-Hadad's Egyptian nationality?

Pet. App. 87a-88a.

6. On remand, the district court again denied petitioners' claim to immunity. Focusing on the fourth question suggested by the court of appeals — the "nature of Mr. El-Hadad's work" — the district court observed that El-Hadad performed "general accounting duties, like daily and monthly accounting, preparing checks for payment of invoices, [and] preparing financial reports." Pet. App. 76a. The court noted that, "since auditors are routinely hired by private businesses, this, too, may suggest that plaintiff's work at the UAE's Embassy was more commercial than governmental." *Id.* The district court did not appear to consider whether El-Hadad was terminable only for cause (a key characteristic of civil service as it exists in the United States) even though it was *the* essential predicate of El-Hadad's breach of contract claim.

7. After a five day bench trial, the district court concluded that when the UAE's internal employment regulations are viewed through the prism of District of Columbia law, El-Hadad became entitled to employment

for life absent cause. Pet. App. 52a. It then found that the UAE had no cause to terminate his employment. It also found that El-Hadad had been defamed when the Embassy told certain of El-Hadad's former co-workers that he had been dismissed because he had not been performing his job "properly or honestly." Pet. App. 62a-67a.[6]

In reaching its conclusions on the contract claim, the district court effectively refereed the dispute between the UAE's Ambassador to the United States, its Minister of Finance, and the Embassy's new Cultural Attaché, on the one hand, and its Ministry of Higher Education and Scientific Research and the UAE's State Audit Institution on the other, about El-Hadad's conduct and thus his fate. The district court found as a fact that El-Hadad's supporters in the Ministry of Finance were correct in professing El-Hadad's innocence and, conversely, that the Ministry of Higher Education and Scientific Research and the Audit Institute were at best, "reckless," and at worst mendacious, when they claimed to believe the contrary in good faith. Pet. App. 63a-64a. The court thus found for El-Hadad on both his breach of contract claim and his defamation claim, awarding him his former salary for life as well as other damages.

8. The court of appeals affirmed in relevant part, but conceded that the issue of sovereign immunity was "exceedingly close" and the analysis difficult. Pet. App. 12a. Indeed, the court acknowledged that the courts of appeals are sharply divided both as to the applicable

6. Petitioners disputed many of these findings at trial, and continue to believe they are ill-founded. Given the posture of the case, however, they are accepted as true here.

standard and as to the analytical approach courts are to take in applying the standard. Pet App. 7a-10a, nn.1 and 2.

The court of appeals perceived the immunity question as a two-stage inquiry. First, the court determined that if El-Hadad had been "a member of the UAE's civil service," the immunity inquiry would be at an end because, based on the House Report, such employment relationships are *per se* non-commercial. Pet. App. 9a. If, however, it turned out that El-Hadad had not been a "civil servant," the court held, his employment might nonetheless have been non-commercial, and the court would have to inquire further into the nature of his relationship to the UAE. *Id.*

The court found the first question — the apparently bright line between jobs that do and do not qualify as "civil service" — to be a deceptively difficult one. First, the court observed that "there is no definition of 'civil service' in the Foreign Sovereign Immunities Act or its legislative history and associated case law, and there are dangers in borrowing or analogizing to get one." Pet. App. 10a. Moreover, the FSIA's House Report does not indicate whether the determinative criteria for identifying "civil service" status are to be found in U.S. or foreign law, *i.e.*, there is no indication, in the legislative history, much less the statute, whether it will suffice if the employee is denominated as a civil servant under the law of the foreign nation, or whether the "civil servant" must possess some or all of the attributes of civil service traditionally recognized in *this* country. Indeed, the court observed that the phrase "civil servant" under U.S. law embraces "clerical staff, or public relations or marketing agents and *exclude*[*s*]

many policymakers — exactly the opposite of the . . . apparent aim" of Congress. Pet. App. 10a.

The court concluded, however, that El-Hadad's employment lacked what it determined (without meaningful analysis) to be the determinative indicia of civil servant status because (a) he was not denominated as a civil servant in the UAE's regulations;[7] (b) the record contained a 1994 letter from the Embassy's Cultural Attaché indicating that El-Hadad did not "have the [c]ivil servants benefits"; and (c) the regulations on which El-Hadad relied for his employment-for-life claim lumped his position in with "[a]dministrative employees, translators . . . mailmen, drivers, security guards, cooks, waiters, farmers, [and] maintenance" employees. Pet. App. 13a-14a. Like the district court, the court of appeals attributed no apparent significance to the fact that El-Hadad was entitled under these very regulations to life tenure, which, in the present context, one might have supposed to be the single most important attribute of a "civil servant."

Having concluded that El-Hadad was not a civil servant, the court proceeded to what it called "the ultimate question of whether his work involved the exercise of 'powers that can also be exercised by private citizens, as distinct from those powers peculiar to

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7. The court confessed that its holding in this regard would seem "confusing" because the district court had found that "the UAE does not have a [regulatory] definition of 'civil service,' that no such designation appears to exist, and that the UAE does not distinguish between employees paid by the government by categorizing them as civil service employees, governmental employees, or civilian employees." Pet. App. 12a-13a.

sovereigns.'" Pet. App. 17a. On this question, the court found that "El-Hadad did standard accounting work — 'auditing expenditures, reviewing accounting methods, reconciling bank statements or employing auditors to conduct these activities' — of a character easily found in commercial enterprise." Pet. App. 18a. On this basis, the court held that El-Hadad's employment constituted commercial activity and therefore that the UAE and its Embassy were not immune.

9. The UAE and its Embassy petitioned for rehearing *en banc*, which was denied.

REASONS FOR GRANTING THE PETITION

As the court of appeals recognized, its decision in this case deepens an existing division of authority on the application of the "commercial activity" exception to the FSIA. This division of authority carries with it all of the uncertainty and instability that typically accompanies such differences of opinion among the appellate courts, but because the FSIA was intended to limit the ability of the U.S. courts to intrude into the internal affairs of foreign sovereigns, the problems presented by *this* circuit split are unusually — indeed, uniquely — profound. *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 425 U.S. 682, 699 (1976) (permitting lawsuits against foreign states presents the potential to interfere with "the executive arm in its conduct of foreign affairs."). Although Congress no doubt intended the FSIA to make the U.S. courts generally available to its citizens (or even resident aliens) when a foreign sovereign participates in the local markets as a purveyor or purchaser of goods or services, the ill-defined standard

adopted below has no such focus and authorizes the federal courts to manage the internal affairs of foreign sovereigns in ways Congress could not have anticipated.

Until the FSIA was adopted, "American courts had generally regarded foreign sovereigns as absolutely immune from suit (with exceptions where the political branches made case-specific recommendations to suspend immunity)." Pet. App. 5a-6a. Over time, the absolute nature of this rule proved troublesome, and through the FSIA, the United States adopted the doctrine of "restrictive immunity" that permitted, in limited circumstances, civil actions against such entities. Pet. App. 130a. The House Report accompanying the bill that would become the FSIA observed:

> American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes. Instances of such contact occur when U.S. businessmen sell good[s] to a foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention.

Pet. App. 129a. Under these circumstances, Congress believed that the courts should be available to the affected "American citizens."

The general rule, however, remains immunity: "a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). An exception to a statutory general rule is generally given a narrow construction, and, given the stakes, courts should be particularly careful about giving the "commercial activity" exception to the FSIA an unduly expansive construction.

The experience in the lower courts in interpreting the "commercial activity" exception reveals no such circumspection. Courts have regularly failed to appreciate the peculiar risks of insinuating American standards, mores, and judicial procedures into the affairs of foreign nations. Certainly, part of the problem can be ascribed to the opacity of the statutory language: the critical term — "commercial" — is left "largely undefined." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992). This Court has previously acknowledged the problem, but aptly observed that courts "do not . . . have the option to throw up [their] hands" and must instead accept the "judicial responsibility to determine what a 'commercial activity' is for purposes of the Act." *Nelson*, 507 U.S. at 359.

Accordingly, to fill the gap left by ambiguous statutory language, some courts have fixed upon a brief passage in the House Report on the bill that ultimately became the FSIA as if it were statutory text. This peculiar and unwarranted devotion to the House Report is compounded by the fact that the terms used in the Report are themselves undefined, and are impregnated

with their own ambiguities. As a result, each court of appeals to analyze the question has provided its own construction, incompatible with those used in other courts. The result has been not merely a chaotic and unpredictable approach circuit-to-circuit, but also widely divergent approaches to similar factual scenarios even among courts purporting to use the same standard. This case provides an opportunity for the Court to resolve this division of authority and provide predictability on an important subject where uncertainty currently reigns.

I. CONGRESS EXPECTED THE COURTS — INCLUDING THIS COURT — TO DEVELOP PRACTICAL AND RELIABLE STANDARDS FOR IDENTIFYING "COMMERCIAL ACTIVITIES," BUT THE COURTS OF APPEALS HAVE FAILED TO DO SO

A. The Statutory Language, By Itself, Provides Little Meaningful Assistance In Defining "Commercial Activities"

When it enacted the FSIA, Congress understood that it had provided courts with little in the way of guidance for identifying the sort of conduct that would constitute "commercial activities" and thus would fall outside the general rule of immunity. Indeed, the House Report on the bill that became the FSIA expressed Congress's desire to give courts a "great deal of latitude" in specifying behavior that would be "commercial." Pet. App. 132a. Those standards have yet to develop.

The statute creates a general rule of immunity:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604.

Following this general rule, the Act carves out certain limited exceptions. The only one pertinent here is the "commercial activity" exception:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state.

28 U.S.C. § 1605(a)(2).

The Act defines "commercial activity" as follows:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the *nature* of the course of conduct or particular transaction or act, rather than by reference to its *purpose*.

28 U.S.C. § 1603(d) (emphasis added).

The Act thus asks courts to draw a distinction between the "nature" and the "purpose" of the transaction at issue. Courts searching for commercial activity are directed by § 1605(a)(2) to examine the former, but precluded from considering the latter.

The Fifth Circuit has explained that the distinction articulated by the statute is difficult to apply in practice:

> [W]e do not believe that an absolute separation is always possible between the ontology and the teleology of an act. Often, the essence of an act is defined by its purpose—gift-giving, for example. Unless we can inquire into the purposes of such acts, we cannot determine their nature. Indeed, commercial acts themselves are defined largely by reference to their purpose. What makes these acts commercial is not some ethereal essence inhering in the conduct itself; instead, as Congress recognized, acts are commercial because they are generally engaged in for profit.

De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1393 (5th Cir. 1985).

B. Relying On The House Report Has Led The Courts Of Appeals To Adopt Incompatible Standards

Because the statutory text is "somewhat circular,"[8] and "muddied,"[9] courts have regularly looked to the House Report to define what is and is not immune. That strategy has not provided the hoped-for clarity; indeed, the House Report has produced even greater fodder for confusion. This is the Report's entire guidance with respect to employment relationships:

> Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States. . . . Activities such as . . . [the foreign nation's] employment or engagement of laborers, clerical staff or public relations or marketing agents . . . would be among those included within the definition [of commercial activity].

Pet. App. 131a-132a.

The courts of appeals have responded to this sparse passage in vastly different ways. The Seventh and Ninth Circuits have interpreted the three listed categories of

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8. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1108 n.6 (5th Cir. 1985).

9. *Segni v Commercial Office of Spain*, 835 F.2d 160, 164 (7th Cir. 1987).

"immune" positions as exhaustive: if the employee involved is not a diplomat, a civil servant, or a member of the foreign state's military, in these circuits, immunity is simply not available.

Expressly rejecting this view, and acknowledging the circuit split on the issue, the D.C. Circuit has concluded that:

> To our eyes, [this] phrase . . . is plainly meant to be illustrative and not exhaustive (and wouldn't make sense if read to be exhaustive). In addition, it would be difficult to square the rule that non-civil servants (and non-diplomats or non-soldiers) are necessarily commercial with cases thoughtfully engaging the commercial activity exception in the employment context where the civil servant (diplomat, soldier) issue simply doesn't arise.

Pet. App. 9a; *accord Kato v. Ishihara*, 360 F.3d 106, 111 (2d Cir. 2004) (categories in House Report are "merely examples of the broader distinction made in the text of the FSIA between activities that are by nature 'commercial' and those that are not. . . .").

1. Mechanical Application Of The "Civil Service" Designation Cannot Provide The Needed Guidance

The House Report's taxonomy, seemingly straightforward on its surface, conceals further opportunities for mischief. It provides no definition of the term "civil service." To the extent that Congress

actually considered the question, it may have expected courts to look to the employment classifications used by the sovereign nation at issue, but many countries (like the UAE) do not use the term "civil service" in categorizing employees in any meaningful way. Pet. App. 10a. Moreover, giving controlling weight to the designations adopted by foreign nations would appear to authorize foreign states to immunize activity related to their most routine "commercial" employment relationships simply by calling them "civil service," a result that would seem to be irreconcilable with the language of the statue, which directs judicial inquiry to the true "nature" of the "transaction" at issue.

Conversely, perhaps Congress expected the courts to determine whether the employment relationship at issue bears the attributes of "civil service" as that phrase exists in the U.S. Even if there was more evidence that this is what Congress intended, it would not provide courts with any more reliable guidance. The House Report is mute on *which* characteristics of U.S. civil service employment would mark one as within the "commercial activity" exception. For example, in this case, the district court found (in a conclusion expressly affirmed by the court of appeals and not challenged here) that El-Hadad was entitled under the UAE's own internal employment regulations to employment for life (absent cause for discharge), a characteristic that one might classify as *the* critical attribute of civil service under our system (especially in a wrongful discharge case like this one). Both courts below were silent on the role this diagnostic feature of civil service should play in the analysis, and instead focused on the fact that

El-Hadad did not get some unstated employee benefits to which other groups of UAE employees were entitled.[10]

The reference to civil service in the House Report conceals another latent but unavoidable difficulty. The House Report suggests that a distinction exists between "[a]ctivities such as . . . the employment or engagement of . . . clerical staff" — which would be "commercial activity" — and the employment of civil service employees, which would be non-commercial and immune. Indeed, the court of appeals in this case held that "administrative employees" would, by definition, lie *outside* the "civil service" classification. Pet. App. 15a.

These categories do not "sort" as either the court of appeals or the House Report apparently believed. The U.S. Civil Service encompasses entire "job families" specifically defined as administrative positions. How, for example, would one treat a foreign sovereign's employment of someone who would, under the U.S. Civil Service System, fit within the GS-0303 "Miscellaneous Clerk and Assistant Series?"[11] Incumbents in such jobs are, by definition, "civil service" (and thus presumably immunity would attach), but that classification cannot

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10. The courts of appeals have variously identified as relevant the following: employment for life absent cause or entitlement to tenure (*Holden v. Canadian Consulate*, 92 F.3d 918, 921 (9th Cir. 1996)); permission to make elections for the sovereign's benefits (*El-Hadad v. United Arab Emirates*, 496 F.3d at 665-66; *Holden*, 92 F.3d at 921; *Segni*, 835 F.3d at 165); or competition for an examination prior to being hired (*Holden* at 921).

11. James, Kay, U.S. Office of Personnel Management, Handbook of Occupational Groups and Families 34-38 (Aug. 2002), *available at* https://www.opm.gov/fedclass/gshbkocc.pdf.

be squared with the court of appeals' determination that "administrative employees" are, as a matter of law, "commercial." Both cannot be true.

2. Analogies To Private Sector Jobs Are Not Useful In Defining "Commercial Activities"

Both courts below concluded that immunity turns — or at least can turn — on whether the plaintiff-employee performed duties that mirror those performed in the private sector; if they do, they are "commercial" and no immunity exists. Pet. App. 15a-18a, 39a-41a. *See also Segni*, 835 F.2d at 165; *Holden*, 92 F.3d at 922. Both courts noted that El-Hadad was an auditor, and because auditors are regularly employed in the U.S. economy, both held that immunity was unavailable.

But there are precious few jobs classified in the U.S. Civil Service that are *not* also found in the private sector, *e.g.*, economists (GS-0110), psychologists (GS-0180), human resources professionals (GS-0201), and — more pertinent to this case — the Accounting and Budget Group's Auditing Series (GS-0511).[12] Very few U.S. civil service jobs are uniquely, or even most frequently, governmental in nature. Any standard for identifying "commercial activity" in employment cases that looks for analogous jobs in the private sector would make immunity a rarity and federal court jurisdiction commonplace. At a sufficient level of abstraction, nearly every job within an embassy has private sector analogs. Suppose, for example, that the employee terminated in

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12. HANDBOOK OF OCCUPATIONAL GROUPS AND FAMILIES at 26 (economists), 28 (psychologists), 30-31 (human resources professionals), 45-46 (accounting and budgeting group).

this case had been the Ambassador's legal advisor, and that he claimed to have been discharged for advising the Ambassador about incidents of misconduct by Embassy employees. Washington is heavily populated with lawyers and they regularly give such guidance to private sector employers. Under the rule adopted by the court of appeals, the courts of the United States would be authorized to inquire into the nature of the advice the Ambassador had received and its role in the Advisor's termination, a result that cannot be squared with the FSIA's design and purpose.

3. The "Commercial Activity" Exception Cannot Extend To Every Employee Who Is Not A "Policy-Maker"

Similarly, some courts (like the court of appeals in this case) have asked whether the employee at issue played a "role in the creation of governmental policy." Pet. App. 15a; *Segni*, 835 F.2d at 165; *Holden*, 92 F.3d at 922. The question pre-ordains an unjustifiably cramped view of sovereign immunity. Within the UAE's Embassy, it is doubtful that *any* non-diplomatic employees "create government policy." Indeed, the President of the United States would likely bristle at the notion that U.S. Ambassadors abroad "create" policy; that role is reserved in our system for elected officials.

Construing the FSIA in this cramped way, courts have ensured that nearly all of the activities of an Embassy will be subject to federal court management. Given the broad general rule of immunity established by the FSIA and the nearly absolute pre-existing rule of immunity that the Act was intended to codify, that could not have been Congress' intent.

4. The Nationality Of The Employee/ Plaintiff Cannot Be Determinative

The House Report also suggests that the universe of those employed by foreign states can usefully be divided into two mutually exclusive categories: "diplomatic, civil service, or military personnel [which are non-commercial, and] American citizens or third country nationals [employed] by the foreign state in the United States." Pet. App. 131a-132a. The underlying assumption is that "American citizens [and] third party nationals" cannot be, or never are, employed in non-commercial roles. El-Hadad is an example that disproves that assumption. Before assuming his duties at the Washington Embassy, he was an Egyptian citizen working for the UAE in Abu Dhabi (where he had lived for 16 years). As the district court noted, "[b]oth parties agreed that small countries such as the U.A.E. do, at times, employ nationals of other countries (and particularly citizens of regional neighbors) in high governmental positions.... An estimated 75% of the U.A.E.'s population between the ages of 15 and 64 consists of non-nationals." Pet. App. 85a, n.6.

Indeed, undisputed record evidence at trial established that some of the Justices of the UAE's Ministry of Justice are Egyptian nationals. If such a Justice came to the UAE's Embassy in Washington to work for a period, for example, to provide guidance to the Ambassador, he would, under this analysis, be a "third country national," and, as a result, a "commercial" employee of the UAE. Undue reliance on the passing comments in the House Report can lead to preposterous results.

5. The House Report's Focus On The Employment Relationship Rather Than The Elements Of The Cause Of Action Cannot Be Reconciled With This Court's Decision In *Nelson*

Finally, single-minded judicial devotion to the House Report has led the courts of appeals to confuse the "activities" on which they are expected to focus in applying these other ill-defined standards. The commercial activity exception applies only where "the action is *based upon* a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2) (emphasis added).

In *Nelson*, this Court held that the phrase "based upon" means that, in addressing the immunity question, the court must focus on "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357. Congress, the Court explained, "manifestly understood there to be a difference between a suit 'based upon' commercial activity and one 'based upon' acts performed 'in connection with' such activity. . . . The only reasonable reading of [the statutory language] calls for something more than a mere connection with, or relation to, commercial activity." *Id.* at 358.

In the employment context, even where the employee's job includes — or is predominantly devoted to — commercial activities, *Nelson* teaches that immunity attaches unless the cause of action is itself *based on those commercial activities*. It will not suffice if the cause of action is derivatively connected to the employment relationship in a but-for sense.

The courts of appeals have not appreciated this distinction. Indeed, the court below expressly stated that it would "focus [its] commercial activity analysis on the employment relationship between El-Hadad and the U.A.E. embassy as a whole, rather than narrowly on El-Hadad's termination alone or separately on El-Hadad's termination and defamation." Pet. App. 7a, n.1. To be true to *Nelson*, the courts in this case should have examined separately the elements of each of El-Hadad's causes of action and determined, separately, whether the wrongful discharge and defamation claims were "based upon" commercial activities. They did not.

Thus, although the courts' formulation of the test is irreconcilable with *Nelson*, its confusion should be attributed not to disobedience but to the bewildering and inconsistent standards the court believed itself obliged to apply. This case presents an opportunity to rectify that problem and establish the sort of clear and unambiguous standards for which the courts have been searching.

II. THE CONFUSING, INCONSISTENT AND UNRELIABLE STANDARDS CURRENTLY APPLIED BY THE COURTS OF APPEALS HAVE PREDICTABLY LED TO UNPREDICTABLE RESULTS

Given the ambiguities — patent and latent — in the relevant statutory text and the legislative history, it cannot be surprising that the courts have reached wildly inconsistent results based upon similar facts. For example, the Seventh Circuit in *Segni*, 835 F.2d 160, concluded that no immunity was available to Spain in a breach of employment contract suit brought by an

individual employed to "develop[] the marketing of Spanish wines in the midwest area of the United States." *Id.* at 162. It reached this conclusion largely because the plaintiff (a) "had no role in the creation of government policy or its administration"; (b) did not supervise others; and (c) was not "privy to [Spain's] political deliberations . . . as a civil servant or diplomat would be." *Id.* at 165-66.[13] *Accord Elliott v. British Tourist Auth.*, 986 F. Supp. 189 (S.D.N.Y. 1997) ("the hiring of a marketing agent is certainly" a commercial activity).

Conversely, the Second Circuit in *Kato*, 360 F.3d 106, held that immunity *was* available to Japan in a discrimination and retaliation lawsuit brought by a woman who conducted "promotional activities on behalf of Japanese companies, such as manning booths at trade shows to promote specific products." *Id.* at 109. The *Segni* decision notwithstanding, the *Kato* court concluded that "[a]gencies of foreign governments do not undertake 'commercial activit[ies]' merely by engaging in these basic and routine trade promotional activities." *Id.* at 112. It reached this result despite the House Report's admonition that "public relations or marketing agents . . . would be among those included within the definition" of commercial activity. Pet. App. 132a.

In *Hansen v. Danish Tourist Bd.*, 147 F. Supp. 2d 142 (E.D.N.Y. 2001), the plaintiff, an employee of the

13. The Seventh Circuit did not explain what it understood the phrase "civil servant" to mean or how it came to understand that civil servants would ordinarily be expected to be "privy to . . . political deliberations." That surely cannot be reconciled with the civil service system that would have been most familiar to the Congress that enacted the FSIA.

Danish Tourist Board, sued claiming promotion discrimination among other things. The court spent no time with the House Report, or making analogies between governmental and private sector jobs. Rather, the court held that the challenged activities, "as alleged by the plaintiff, are basic employment decisions akin to those made by many small businesses" and therefore held, irrespective of the *position* the plaintiff held, the defendant's activities were commercial. *Hansen*, 147 F. Supp. 2d at 151. This rule of decision cannot be reconciled with the analysis of *any* appellate court, and it creates a standard for the "commercial activity" exception that all but swallows the general rule of immunity. *Every* employment case, almost by definition, is premised on the kinds of employment decisions made by private employers — hiring, firing, pay and promotion.

The plaintiff in *Mukaddam v. Permanent Mission of Saudi Arabia To The United Nations*,[14] was employed by the Saudi Arabian Mission to the United Nations. She wrote speeches given by the Saudi government at the U.N., among other duties. *Mukaddam*, 111 F. Supp. 2d at 463. Presumably, in this role she was privy to high-level policy deliberations among Saudi diplomats, and she filled a role that has no easy analogue in the private sector. In some courts, her employment would have been non-commercial. No matter. When she sued the Mission *inter alia* for sex discrimination, the district court held that her employment was a "commercial activity" because she had never taken a civil service examination, and received no civil service "protections" from the Saudi

14. 111 F. Supp. 2d 457 (S.D.N.Y. 2000) and 136 F. Supp. 2d 257 (S.D.N.Y. 2001).

government. *Id.* at 464. Acknowledging that the statute and the House Report were "somewhat muddy" (*Mukaddam*, 111 F. Supp. 2d at 465), the court nonetheless claimed that it has done "its best to define a term as to which Congress gave little guidance." *Mukaddam*, 136 F. Supp. 2d at 261.

In *Butters v. Vance Int'l, Inc.*, 225 F.3d 462 (4th Cir. 2000), the Fourth Circuit held that Saudi Arabia was immune from an employment discrimination suit brought by a security guard hired to augment the security detail provided to the wife of Saudi King Fahad on a trip to the United States. *Id.* at 465. The plaintiff was surely no diplomat; rather, she was a "part-time, at-will security [guard]." *Id.* at 464. She was not involved in internal Saudi political debates, she made no Saudi policy, she supervised no subordinates, she had taken no pre-employment exam, and, as an at-will employee, she was not entitled to life tenure absent cause. She performed a job — security guard — that is commonplace, even ubiquitous, in the private sector. And yet, the Fourth Circuit concluded that "the relevant act here — a foreign sovereign's decision as to how best to secure the safety of its leaders — is quintessentially an act 'peculiar to sovereigns.'" *Id.* at 465.

El-Hadad was a senior Embassy official, brought from overseas to monitor and administer the expenditure of UAE funds for a multi-million dollar UAE governmental program. In performing his job, he supervised at least eight individuals. With respect to the events that led to his discharge, he reported directly to Ministers and Ambassadors. His termination became a matter of internal dispute among Ministers and agencies of the UAE government, a dispute the court below presumed to resolve according to the law of the District of Columbia, where none

of the operative acts occurred. His "auditor" function fits neatly into the U.S. Civil Service classification system. Under any analysis designed to give the general rule of immunity embodied in the FSIA any practical meaning in employment cases, El-Hadad's position would have to be classified as "non-commercial," but given the absence of intelligible standards, it is impossible to tell whether the result reached below would have been replicated in other circuits. It is apparent that the lower courts need guidance.

III. THE APPROPRIATE STANDARD WOULD TAKE ACCOUNT OF THE PURPOSE OF SOVEREIGN IMMUNITY AND THE APPROPRIATELY NARROW CONSTRUCTION GIVEN EXCEPTIONS TO BROAD STATUTORY RULES

The "commercial activity" exception to the FSIA is just that — an exception to the otherwise applicable general rule that sovereigns are immune from the jurisdiction of United States courts. As this Court has previously held, "[i]n construing provisions. . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989) (quoting *Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people")).[15]

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15. *See also Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir. 2001) ("[O]ur jurisdiction under the FSIA should be construed narrowly"); *Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000) ("Because those [FSIA] exceptions are in derogation of the common law, we must not read them broadly.").

This salutary principle of statutory construction is particularly important in this case, where the rights of sovereign nations, the powers of the judiciary, and the prerogatives of the Executive Branch to manage the Nation's foreign affairs intersect. "One of the main concerns of the immunity framework is to accommodate 'the interests of foreign states in avoiding the embarrassment of defending the propriety of political acts before a foreign court.'" *Butters*, 225 F.3d at 465 (citing *Broadbent v. Org. of Am. States*, 628 F.2d 27, 33 (D.C. Cir. 1980)); *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964); *see also* H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6606 (FSIA was intended to "reduce[e] the foreign policy implications of immunity determinations."). "These acts often have political, cultural, and religious components." *Butters* at 465. For that reason, "the Act requires not that we approve of the diverse cultural or political motivations that may underlie another sovereign's acts, but that we respect them." *Id.* at 466-67. Otherwise, exercising jurisdiction over foreign nations in suits involving such decisions would be much like "an English court trying to judge a dispute between the French Government and one of its officials." *Broadbent*, 628 F.2d at 35, n.27.

These important, long-standing principles cannot be reconciled with the standards currently employed in the lower courts. The multiple existing standards can effectively limit immunity to military officers and those in policy-making positions, defeat Congress's evident design, and regularly press the United States judiciary into service "judg[ing] dispute[s] between [foreign] Government[s] and [their] official[s]." There is no

evidence that Congress intended the courts to play such a dangerous and unnecessary role, and the Court should take this opportunity to more carefully mark out the limits of the commercial activity exception.

CONCLUSION

For the forgoing reasons the writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED JULY 27, 2007

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 06-7075

Mohamed Salem EL-HADAD,

Appellee

v.

UNITED ARAB EMIRATES and
The Embassy of the United Arab Emirates,

Appellants.

Argued March 13, 2007.
Decided July 27, 2007.
Rehearing En Banc Denied Sept. 21, 2007.

Before: TATEL, GARLAND and BROWN, Circuit Judges.

Opinion for the Court filed by Circuit Judge BROWN.

Appendix A

BROWN, Circuit Judge:

The chief question in this appeal is whether the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.*, shields the United Arab Emirates from the wrongful termination and defamation suit of its former employee, Mohamed Salem El-Hadad, once an accountant in the U.A.E.'s embassy here in Washington, D.C. The case turns on an application of the Act's commercial activity exception. *Id.* § 1605(a)(2). Since we conclude El-Hadad was not a civil servant under the Act, and his work did not involve the exercise of distinctively governmental powers, we affirm the district court in applying the commercial activity exception and denying immunity. A relatively minor issue-the district court's failure to discount El-Hadad's future lost earnings to present value-compels us to reverse in part and remand the case solely for correction of that aspect of the damages award.

I

The facts below summarize the district court's detailed findings after a bench trial, which we set aside only if clearly erroneous. *See El-Hadad v. Embassy of U.A.E.*, No. 96-1943, 2006 WL 826098 (D.D.C. Mar. 29, 2006); Fed.R.Civ.P. 52(a).

El-Hadad is an Egyptian citizen who earned a bachelor's degree in accounting in 1976 and began a career marked for many years by one promotion and positive job review after another. From 1982 to 1992, he

worked as an auditor for the government of the United Arab Emirates in Abu Dhabi (not an unusual arrangement for the U.A.E., whose population between the ages of 15 and 64 numbers about 75% non-nationals, *El-Hadad v. U.A.E.*, 216 F.3d 29, 33 & n. 6 (D.C.Cir.2000)). In 1992, he formally resigned to begin work at the U.A.E.'s embassy in Washington, where he was an auditor and supervising accountant in the cultural attaché's office-and where he soon discovered that the cultural attaché, his deputy, and others were involved in embezzling no less than $2 million in U.A.E. state funds. El-Hadad exposed the embezzlement and helped with the subsequent investigation. In 1994, he was promoted and commended for his work while the cultural attaché and his accomplices were sacked.

About a year and a half later, in 1995, El-Hadad was accused of financial impropriety in connection with the very embezzlement he had exposed. Why he was accused-for the record and the district court's opinion make clear that the accusation was baseless to the core-is a mystery, though a letter the U.A.E.'s Minister of Finance wrote on El-Hadad's behalf gives a clue: "The existing disputes between the Cultural Attaché in Washington and the . . . Ministry of Higher Education and Scientific Research have directly impacted the case of Mr. Mohammed El-Hadad. . . ." *El-Hadad*, 2006 WL 826098, at *4 (quoting Pl.'s Ex. 85). In fact, the U.A.E.'s Ambassador to the United States, the Minister of Finance, and the new cultural attaché each sent multiple letters vouching for El-Hadad's character and competence and refuting the allegations against him

point-by-point-views the district court seconded in its factual findings, concluding that the documents in the record "demonstrate either that the alleged impropriety was not, in fact, improper or that if there was any fault, it lay elsewhere, such as with the embezzlers El-Hadad had detected and reported." *Id.* Nonetheless, the department named in the Minister of Finance's letter, the Ministry of Higher Education and Scientific Research, had final authority over El-Hadad's employment in the cultural attaché's office and, in 1996, ordered penal dismissal along with fines for the money El-Hadad allegedly mishandled.

After he was fired, El-Hadad briefly found work as an auditor with the U.A.E.'s military attaché, but the Ministry of Higher Education and Scientific Research viewed the job as a "circumvention of the penal termination imposed," *id.* at *5, and, in late summer 1996, had him fired again. At about the same time, a representative of the Ministry held a meeting about El-Hadad's dismissal with the fifteen or so employees of the cultural attaché's office, announcing that El-Hadad was fired for not doing his job properly or honestly. And since then, in application after application both here and in Egypt (where he returned in 1997), El-Hadad has been rejected from every accounting job for which he has applied, always after inquiries about the circumstances in which his prior employment ended. His efforts over the last decade to find work in other fields and to start his own business have failed as well.

El-Hadad sued the U.A.E. and its Washington embassy for breach of his employment contract and defamation in August 1996, just after being fired from his job with the military attaché. Claiming immunity from suit under the Foreign Sovereign Immunities Act, the U.A.E. moved to dismiss. The district court, applying the Act's "commercial activity" exception, denied the motion. *El-Hadad v. Embassy of U.A.E.*, 69 F.Supp.2d 69 (D.D.C.1999) (*El-Hadad I*). On interlocutory appeal (under the collateral order doctrine), we reversed in part and remanded with a list of questions for the district court to answer before characterizing the employment relationship between El-Hadad and the U.A.E. as commercial. *El-Hadad v. U.A.E.*, 216 F.3d 29 (D.C.Cir.2000) (*El-Hadad II*). Applying the analytic framework we had laid out, the district court once again held the commercial activity exception to apply. *El-Hadad v. Embassy of U.A.E.*, No. 96-1943 (D.D.C. July 16, 2001) (*El-Hadad III*). The parties agreed to a bench trial, after which the district court reaffirmed its decision to deny immunity and concluded on the merits that the U.A.E. breached its employment contract with El-Hadad ($1,245,961 in damages, plus interest) and defamed him ($500,000 in damages). *El-Hadad v. Embassy of U.A.E.*, No. 96-1943, 2006 WL 826098 (D.D.C. Mar.29, 2006) (*El-Hadad IV*). The U.A.E. now appeals.

II

The chief issue before us is the U.A.E.'s claim to immunity under the Foreign Sovereign Immunities Act. Before passage of the 1976 Act, American courts had

generally regarded foreign sovereigns as absolutely immune from suit (with exceptions where the political branches made case-specific recommendations to suspend immunity). *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486-88, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983) (discussing the legacy of Chief Justice Marshall's opinion in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812)). But almost from the outset, courts recognized a distinction "between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976); *see also United States v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat) 904, 907, 6 L.Ed. 244 (1824) (Marshall, C.J.) ("[W]hen a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."). That distinction became the basis for a " 'restrictive' theory of foreign sovereign immunity," a theory Congress codified in the Foreign Sovereign Immunities Act of 1976. *Verlinden B.V.*, 461 U.S. at 487, 103 S.Ct. 1962. So while the Act announces that foreign states "shall be immune from the jurisdiction of the courts of the United States and of the States," 28 U.S.C. § 1604, the Act's principal effect is in the list of exceptions that follows, and the "most significant" exception, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992), the one at the heart of the restrictive theory as a whole and at issue in this appeal, is the commercial activity exception of § 1605(a)(2): "A foreign state shall

not be immune . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state. . . ." A state engages in commercial activity, the Supreme Court has explained (since the Act never defines the term), "where it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns,' " *Saudi Arabia v. Nelson*, 507 U.S. 349, 360, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) (quoting *Republic of Argentina*, 504 U.S. at 614, 112 S.Ct. 2160) (internal quotation marks omitted).

Since El-Hadad's action is "based upon" breach of his employment contract and defamation in connection with that breach, this case involves the commercial activity exception as applied in the employment context. *See Saudi Arabia*, 507 U.S. at 357, 113 S.Ct. 1471 (holding that the term "based upon" in the Act indicates "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case").[1] The

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1. We nonetheless focus our commercial activity analysis on the employment relationship between El-Hadad and the U.A.E. embassy as a whole, rather than narrowly on El-Hadad's termination alone or separately on El-Hadad's termination and defamation. Otherwise this case might entirely defy analysis (what would be a "commercial" or "non-commercial" breach of contract?), and split off both from *El-Hadad II*, 216 F.3d at 34-36, and from other circuits' handling of FSIA challenges to wrongful termination (and related) claims, *see, e.g., Kato v. Ishihara*, 360 F.3d 106, 111-12 (2d Cir.2004); *Holden v. Canadian Consulate*, 92 F.3d 918, 921 (9th Cir.1996); *Segni v. Commercial Office of Spain*, 835 F.2d 160, 164-66 (7th Cir.1987). In fact, much

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Act doesn't speak directly to this context, but its legislative history does: "[P]ublic or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel," while commercial and not public or governmental in nature would be the "employment or engagement of laborers, clerical staff, or public relations or marketing agents." H.R. Rep. No. 94-1487, at 16 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6615; *see also* S. Rep. No. 94-1310, at 16 (1976) (identical language). Thus, like many of our sister circuits, we have held that a foreign government's civil servants (and diplomats and soldiers) do *not* qualify for the commercial activity exception. *El-Hadad II*, 216 F.3d at 34 (citing *Broadbent v. Organization of American States*, 628 F.2d 27, 34-36 (D.C.Cir.1980)); *see also Kato v. Ishihara*, 360 F.3d 106, 111-12 (2d Cir.2004); *Holden v. Canadian Consulate*, 92 F.3d 918, 921 (9th Cir.1996); *Segni v. Commercial Office of Spain*, 835 F.2d 160, 164-66 (7th Cir.1987). We have not and do not affirm the converse: A foreign government's employee might not be a civil servant (or diplomat or soldier) and still be

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can turn on the activity chosen for the commercial activity analysis, though the issue is not in dispute in our case. *Compare Saudi Arabia*, 507 U.S. at 358, 113 S.Ct. 1471 (holding the relevant act to be misusing state police to imprison and torture a hospital worker), *with id.* at 365, 113 S.Ct. 1471 (White, J., concurring) (regarding the relevant act as "run[ning] and operat[ing] a hospital"); *see also Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 465 (4th Cir.2000) (holding the relevant act to be "how best to secure the safety of [Saudi Arabia's] leaders" in a female security agent's Title VII claim against Saudi Arabia).

engaged in quintessentially governmental work-like, for example, a judge. Thus, if El-Hadad is a civil servant, our analysis stops for we have determined that the U.A.E. is immune from his suit. If El-Hadad is not a civil servant, we go on to scrutinize whether his work involves the exercise of "powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Saudi Arabia*, 507 U.S. at 360, 113 S.Ct. 1471 (internal quotation marks omitted). As we framed it in *El-Hadad II:* "[T]he operative question is whether El-Hadad was a member of the U.A.E.'s civil service" and "[t]he ultimate question ... is whether El-Hadad's employment constituted commercial activity." 216 F.3d at 34. Of course, the first inquiry might well illuminate the second.[2]

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2. Not all circuits approach these questions as we do. First, while one court has, like us, expressly held that a non-civil servant (and non-diplomat, non-soldier) is not necessarily a commercial employee, *Crum v. Kingdom of Saudi Arabia*, No. 05-275, 2005 WL 3752271, at *4 (E.D.Va. July 13, 2005), another has suggested the opposite, *Holden*, 92 F.3d at 921, and still others have seemed to assume the opposite, *see, e.g., Segni*, 835 F.2d at 164-65. To our eyes, the phrase in the House and Senate Reports that undergirds this area of jurisprudence, "diplomatic, civil service, or military personnel," is plainly meant to be illustrative and not exhaustive (and wouldn't make sense if read to be exhaustive). In addition, it would be difficult to square the rule that non-civil servants (and non-diplomats or non-soldiers) are *necessarily* commercial with cases thoughtfully engaging the commercial activity exception in the employment context where the civil servant (diplomat, soldier) issue simply doesn't arise. *See, e.g., Janini v. Kuwait Univ.*, 43 F.3d 1534 (D.C.Cir.1995). Second, and relatedly, not all circuits have taken the same two-stage approach

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Appendix A

There is no definition of "civil service" in the Foreign Sovereign Immunities Act or its legislative history and associated case law, and there are dangers in borrowing or analogizing to get one. Our country's notion of a civil service has certain characteristic features (like merit selection, well-defined personnel procedures, and benefits), but we can't rightly expect foreign governments to either "mimic civil service protections now common to the United States" or "sacrific[e] the immunity conferred by FSIA." *Kato*, 360 F.3d at 113. And in fact, our country's notion of a civil service, conceived as an antidote to political patronage, tends to *include* "clerical staff, or public relations or marketing agents" and *exclude* many policymakers-exactly the opposite of the House and Senate Reports' apparent aim. The notion of *public* service might be a closer proxy for that aim. On the other hand, some countries might lack the notion

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we have to the operative question of whether plaintiff is a civil servant and the ultimate question of whether his activity is commercial. The Second Circuit treats the civil servant question as quite secondary ("merely [an] example[ ]" to be used, if at all, only to aid in making the "central" commercial/governmental distinction). *Kato*, 360 F.3d at 111. The Ninth Circuit, on the other hand, treats the civil servant question as effectively superseding the commercial/governmental distinction. *Holden*, 92 F.3d at 921. The Seventh Circuit melds the two together such that exercises of peculiarly governmental power become the chief mark of a civil servant, while exercises of power common to private citizens mark a commercial employee. *Segni*, 835 F.2d at 164-65. We think it makes most sense to conduct two separate but complementary inquiries, keeping the civil service inquiry glued to, but not subsumed by, the statutory command from which it comes.

of a "civil service" altogether, and others might define the notion in a way far afield of FSIA's purpose. We therefore take a flexible and inclusive approach to determining whether a foreign government's employee is a civil servant. *El-Hadad II* lists five generally relevant considerations, while noting that the list is not exclusive, necessarily applicable in all cases, or, unfortunately (but unavoidably), analytically precise:

> First, how do the U.A.E.'s own laws define its civil service, and do El-Hadad's job title and duties come within that definition?
>
> Second, what was the nature of El-Hadad's employment relationship with the U.A.E.? Did he have a true contractual arrangement, or is his "contract" claim instead based, as the U.A.E. contends, solely upon the civil service laws of the U.A.E.?
>
> Third, what was the nature of El-Hadad's employment relationship when he worked in the U.A.E., and how did his subsequent employment at the Embassy relate to that prior tenure? The U.A.E. contends that El-Hadad was a longtime resident and member of its domestic civil service, who was merely "transferred" to Washington to perform the same functions (governmental audits) he had been performing at home. El-Hadad contends, on the other hand, that he quit his position in

> the U.A.E. and began a "new" job in the United States, "separate from his previous employment."
>
> Fourth, what was the nature of El-Hadad's work? As noted above, Congress indicated that the "employment or engagement of laborers, clerical staff or public relations or marketing agents" would come within the definition of commercial activity.
>
> Fifth, what is the relevance of El-Hadad's Egyptian nationality on the facts of this case? Is the U.A.E. a country in which, as the House Report assumed, non-nationals are unlikely to be employed as governmental officers? Or does the U.A.E. often employ non-nationals in governmental positions?

216 F.3d at 34 (internal citation omitted). The district court applied this list to the facts in *El-Hadad III* and repeated the core of its analysis in *El-Hadad IV.* The task isn't easy. The evidence is meager, sometimes contradictory, and the question is exceedingly close. Thus it is of great importance in this case that the foreign sovereign has the burden of proof. *Princz v. F.R.G.*, 26 F.3d 1166, 1171 (D.C.Cir.1994).

As to the first question, the district court found that the U.A.E. does not have a definition of "civil service," that "no such designation[ ] appear[s] to exist," and that the U.A.E. "does not distinguish between employees

paid by the government by categorizing them as civil service employees, governmental employees, or civilian employees." *El-Hadad III*, slip op. at 4-5. Yet confusingly enough, several official U.A.E. documents in the record, including some the district court itself found probative, use the term. Perhaps these contradictory signals result from mistranslations of the documents' original Arabic. *See id.* at 5 n. 3 (suggesting that the same Arabic term or terms might be translated as "civil service" or "public service"). In any case, we find it of some help that a 1994 letter from the U.A.E. embassy's cultural attaché states that El-Hadad "doesn't have the [c]ivil servant benefits." If this letter means what it appears in English to say, it is powerful evidence that El-Hadad was not a civil servant according to U.A.E. law. Even if the letter is mistranslated, the fact that El-Hadad lacked benefits common to other U.A.E. governmental employees is sufficient for El-Hadad to prevail, if only slightly and in light of the burden of proof, on the first factor.

Turning to the second question, El-Hadad was employed in all respects pursuant to the U.A.E.'s "Local Employees Regulations for the UAE Missions Abroad 1983." While not an individualized contract, these regulations provide the clearest evidence available to us that El-Hadad should not qualify as a civil servant. First, the regulations define "local employees" as being generally "[a]dministrative employees, translators . . . mailmen, drivers, security guards, cooks, waiters, farmers, [and] maintenance" and state that local employees should almost always be nationals of the country in which the embassy is located (with exceptions

for "highly exceptional" cases, like, apparently, El-Hadad's). Art. 1/3, 4/5-4/6. Plainly, these regulations are not aimed at what we or the U.A.E. would normally call a civil service. On the contrary, these regulations seem to describe the very people Congress intended the commercial activity exception for: "laborers, clerical staff," and other Americans contracting to perform ordinary commercial services in the United States for a foreign government. Second, the regulations actually refer to a civil service twice (though we note again the possibility of mistranslation), both times in discussing the special case of U.A.E. citizens employed as local employees. Art. 20/2-20/3. While not easy to interpret, the references appear to contrast local employees and civil servants, making "civil service" a status available to local employees, if at all, only if they are also citizens of the U.A.E. Now, it must be said that under the regulations, local employees (like civil servants in this country) may be terminated only for cause; El-Hadad was, under the regulations as well as according to the district court and his own testimony, a permanent employee. Nonetheless, we find the second factor tips decisively in El-Hadad's favor.

The third question is easily answered: While El-Hadad's duties in Abu Dhabi were similar to his duties in Washington, there can be no question that he formally and completely terminated his employment in the U.A.E. before beginning work in the United States. The district court goes farther, stating that "[t]he evidence in the record suggests that El-Hadad's employment at the UAE's embassy in the District of

Columbia was separate from and unrelated to his prior employment in the UAE." *El-Hadad III,* slip op. at 7. Factor three favors El-Hadad.

The fourth question is more complicated. The district court reasoned in *El-Hadad III* that, like laborers, clerical staff, and public relations or marketing agents, and unlike civil servants, El-Hadad "had no role in the creation of UAE government policy and was not privy to UAE political deliberations." Slip op. at 7-8. Elaborating on the point in *El-Hadad IV,* the district court notes El-Hadad performed only the ordinary auditing duties of any commercial accountant and that his duties, "although important and involving large sums of money, were ministerial, not discretionary." 2006 WL 826098, at *6. We agree that, to the extent El-Hadad lacked authority to determine or articulate policy and lacked discretion in his duties, he is more like the employees for whom Congress intended FSIA's commercial exception, and less like a civil servant. What gives us pause is El-Hadad's supervisory authority over at least eight other accountants in the cultural attaché's office. He was a "part of the . . . government," *Holden,* 92 F.3d at 921, in a way an administrative assistant, for example, would not be. On balance, we find his lack of discretion and exclusion from any policy-making role outweighs his supervisory role. Thus factor four resolves in El-Hadad's favor as well-though by a very narrow margin indeed.

The fifth question concerns an issue of central importance in *El-Hadad II,* though not here. The

sentence in the House and Senate Reports classifying civil service work as governmental states in full: "Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States." H.R. Rep. No. 94-1487, at 16 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6615; *see also* S. Rep. No. 94-1310, at 16 (1976) (identical language). At one point, in dicta, we read this language to imply a per se rule that Americans and third country nationals, even if employed by a foreign state as civil servants, count as commercial employees. *Broadbent*, 628 F.2d at 34 (D.C.Cir.1980). The district court's decision on the U.A.E.'s immunity in *El-Hadad I* turned on this dictum. 69 F.Supp.2d at 74-76. But in *El-Hadad II*, impressed with the situation of small countries like the U.A.E. that at times employ non-nationals in high governmental positions, we rejected *Broadbent*'s per se rule and held that "a foreign state can engage in noncommercial (i.e., governmental) activity through third country nationals." 216 F.3d at 33. Thus the relevance of a plaintiff's nationality for the civil service inquiry becomes a matter of context. Where a country rarely if ever hires non-citizens for its civil service (unlike the U.A.E.), non-citizenship strongly indicates that someone is *not* a civil servant. And in our view, citizenship makes someone more likely to qualify as a civil servant even if a country sometimes hires noncitizens as civil servants. *Accord Segni*, 835 F.2d at 165 n. 7 ("[A] person hired by his own country's government to work abroad should have a somewhat

lesser expectation of suing his homeland in his host nation's courts."). Thus, were El-Hadad a U.A.E. citizen, the U.A.E. might press its advantage, and were non-citizens rarely if ever U.A.E. civil servants, El-Hadad might press his. As it is, El-Hadad's nationality is all but irrelevant.

Multifactor tests tend to be inconclusive, but the evidence here suggests El-Hadad is *not* a civil servant-and were the inquiry totally inconclusive, that very fact, together with the U.A.E.'s burden of proof, would decide the matter in El-Hadad's favor. We therefore hold that El-Hadad is not a civil servant and move on to the ultimate question of whether his work involved the exercise of "powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Saudi Arabia*, 507 U.S. at 360, 113 S.Ct. 1471 (internal quotation marks omitted). In so doing, we bear in mind a limiting principle from the statute: "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). One could question whether it is possible to determine the nature of a human activity without reference to its purpose, *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1393 (5th Cir.1985) ("Often, the essence of an act is defined by its purpose-gift-giving, for example."), but the Supreme Court has insisted that the statutory command be carried out, *Republic of Argentina*, 504 U.S. at 617, 112 S.Ct. 2160 ("[The 5th Circuit's] argument is squarely foreclosed by the language of FSIA."), which in practice

means rejecting any argument that rests on the foreign state's *reasons* for undertaking the activity alleged to be commercial, *id.* ("[I]t is irrelevant *why* Argentina participated in the bond market in the manner of a private actor; it matters only that it did so." (emphasis in original)). We cannot attend to whether a foreign government aims to make a profit or protect its borders, whether El-Hadad's work aimed to carry out an international political program or to keep the cultural attaché's office supplied with pens and pencils. We can look only to the resemblance between "the outward form" of his conduct and powers and those of private citizens. *Id.*

One distinctive mark of governmental work is discretionary involvement with sovereign law or policy. According to the district court (and we see no reason to disturb its conclusions), El-Hadad had no role in the creation of governmental policy, and to the extent he carried it out, his duties were "ministerial, not discretionary." *El-Hadad IV*, 2006 WL 826098, at *6. Instead, El-Hadad did standard accounting work-"auditing expenditures, reviewing accounting methods, reconciling bank statements or employing auditors to conduct these activities," *id.* at *7-of a character easily found in commercial enterprise. We therefore affirm the district court's conclusion that El-Hadad's employment was commercial rather than governmental, and agree El-Hadad's suit is authorized under the Foreign Sovereign Immunity Act's commercial activity exception.

III

The U.A.E. raises six other challenges to the district court's rulings, five of which obviously fail and one of which just as obviously succeeds.

At trial, El-Hadad testified over objection that prospective employers asked him why he left his job with the U.A.E.'s embassy and told him they could not hire him due to his penal termination. This was hearsay, the U.A.E. argues, and the district court's findings of fact relied on it. But the testimony was hearsay only to the extent the district court used it for the truth of the matter asserted, and there is only one substantial respect in which the court might have done so: to show the U.A.E.'s defamation caused El-Hadad professional injury. Since the district court found defamation *per se* under D.C. law, *id.* at *15-16, that injury was presumed and any error was harmless. *See* Fed.R.Civ.P. 61.

The U.A.E. complains in two respects about the district court's treatment of documentary evidence. First, the U.A.E. claims the district court admitted into evidence at trial documents undisclosed during discovery. But those documents, which concerned arcane intricacies of the embezzlement El-Hadad exposed, were apparently at issue in substance during discovery; in any case, nothing in the district court's opinion turned on their obscurities. Second, the U.A.E. claims the district court's opinion relies on a pair of documents never properly admitted into evidence at trial. Both documents, however, concern whether El-Hadad qualifies as a civil

servant and were properly submitted to and used by the court in *El-Hadad III;* the court referenced them again in *El-Hadad IV* only by way of reiterating its past work. We find no error or only harmless errors in these matters. *See* Fed.R.Civ.P. 61.

The U.A.E. claims El-Hadad's testimony from Egypt by Internet video violated Federal Rule of Civil Procedure 43(a), which requires "good cause" and "appropriate safeguards" before a witness is permitted to testify "by contemporaneous transmission from a different location." But before permitting the testimony, the district court insisted that El-Hadad prove he had pursued and repeatedly been denied a visa to the United States (as well as show careful preparations for translation and teleconferencing). The U.A.E. retreats to the argument that El-Hadad's testimony was effectively unsworn because, with no extradition treaty between the United States and Egypt, El-Hadad could not be prosecuted for perjury. But this argument's only direct support comes from *Harrell v. State,* 709 So.2d 1364, 1371 (Fla.1998), which concerns the very different issues at stake in applying the Sixth Amendment's Confrontation Clause in the criminal context. In fact, Rule 43 permits video testimony, and its criminal equivalent (Federal Rule of Criminal Procedure 26) doesn't, precisely because the Supreme Court found the criminal context too sensitive for the same rule. *See Order of the Supreme Court,* 207 F.R.D. 89, 93-96 (2002) (Scalia, J.); *United States v. Yates,* 438 F.3d 1307, 1314-15 (11th Cir.2006).

El-Hadad's breach of contract claim required overcoming the District of Columbia's usual presumption of at-will employment. *Sisco v. GSA Nat'l Capital Fed. Credit Union*, 689 A.2d 52, 54-55 (D.C.1997). A properly distributed employee manual with specific termination provisions can do the job, *id.; see also Byrne v. Nat'l R.R. Passenger Co.*, 184 Fed.Appx. 6 (D.C.Cir.2006) (unpublished per curiam), and the district court found the Local Employees Regulations-whose termination provisions provide for dismissal where, for example, an employee's dereliction of duty destroys valuable embassy property or compromises official documents, Art. 17/7-to qualify, *El-Hadad IV*, 2006 WL 826098, at *11. The U.A.E. counters, primarily, that the evidence showing the Regulations to have been distributed was too weak for the district court's conclusion. The evidence *is* weak-at least it is vague-but El-Hadad himself testified to distribution, and several other witnesses supported the claim. That is enough under our "clearly erroneous" standard of review. Fed.R.Civ.P. 52(a).

Finally, the U.A.E. attacks El-Hadad's defamation claim, arguing in the main that the common interest privilege protects all the U.A.E.'s written and spoken statements about El-Hadad's dishonesty. But bad faith vitiates the privilege under D.C. law, *Moss v. Stockard*, 580 A.2d 1011, 1024-25 (D.C.1990), and we have not the slightest difficulty affirming the district court's findings of bad faith, *El-Hadad IV*, 2006 WL 826098, at *16-17.

Thus we come to the U.A.E.'s complaints about damages-principally that the district court failed to

discount El-Hadad's future lost earnings to present value. We agree. "The measure of damages in an employee's action against his employer for breach of the employment contract is generally the compensation 'that would have been due to the employee during the unexpired period of employment *with appropriate reduction to present worth.*' " *Hodge v. Evans Fin. Corp.*, 823 F.2d 559, 569 (D.C.Cir.1987) (emphasis added) (internal quotation mark omitted) (quoting *District of Columbia v. Jones*, 442 A.2d 512, 524 (D.C.1982)). The district court here noted the requirement, *El-Hadad IV*, 2006 WL 826098, at *12, but in the event appears to have overlooked it, *id.* at *13 n. 14. We therefore must reverse in part and remand solely for the district court to perform this task. In all other respects, the district court is affirmed.

So ordered.

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED MARCH 29, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. Civ.A. 96-1943(RWR).

March 29, 2006.

Mohamed Salem EL-HADAD,

Plaintiff,

v.

THE EMBASSY OF THE UNITED ARAB EMIRATES et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ROBERTS, J.

Plaintiff Mohamed Salem El-Hadad sued the United Arab Emirates ("UAE") and its Washington, D.C. embassy for breach of his employment contract and defamation after he was fired from his position as internal auditor for alleged financial improprieties.

El-Hadad asserts that the allegations were false and that defendants defamed him when they made the allegedly false accusations of impropriety. The evidence presented by the parties during a six-day bench trial established that defendants breached the terms of El-Hadad's employment contract, that the UAE defamed El-Hadad, and that El-Hadad is entitled to contract damages and presumed general defamation damages. These findings of fact and conclusions of law explain that conclusion.

BACKGROUND FINDINGS OF FACT

The UAE government maintains a diplomatic mission and an embassy in Washington, D.C. that includes a cultural division headed by a cultural attache. The cultural division answers, at least in part, to the UAE Minister of Higher Education and Scientific Research ("HESR"). The division administers a program funded by the UAE that supports UAE citizens enrolled in colleges in the United States. During the time El-Hadad was auditor at the embassy in the mid-1990s, there were between two thousand and twenty-five hundred UAE students annually in the cultural division's program, with annual program expenditures greater than $50 million.

El-Hadad, born in the summer of 1954, is an Egyptian citizen fluent in Arabic but not in English. He earned a bachelor's degree in accounting in 1976 in Egypt and then served for three years in the Egyptian military. After being honorably discharged from the military, he worked as an accountant in a hotel in Alexandria, Egypt and then as an auditor with the

Ministry of Water. In 1981, he moved to Abu Dhabi, the UAE capital city and seat of government, to take a better paying position as a hotel accountant. He was quickly promoted to auditor of the hotel's food and beverage department. In 1982, he was hired by the UAE government as a "local employee" to work in Abu Dhabi as an auditor in the Ministry of Education, a position he held for the next decade. His job was to review and audit the expenses of the cultural divisions of the UAE embassies worldwide which, at that time, administered the college student support program sponsored by the UAE government. El-Hadad consistently received excellent performance reviews in this position.

In the summer of 1992, while on vacation in the United States, El-Hadad met with the Washington embassy's cultural attache and his deputy and learned from them that the cultural division needed an auditor. They encouraged him to apply for the position. El-Hadad testified that he discussed the job opportunity with them over the course of several weeks and that they specifically told him the job was a permanent position. He decided to take the Washington position and resigned voluntarily from his job in the UAE. Upon his departure from the Ministry of Education, he received a letter from the Assistant Under Secretary attesting that in his work "auditing accounts of Cultural Divisions of the UAE Embassies abroad . . . he was serious and loyal towards his work." (Pl.'s Ex. 3.) In addition, he received a letter from the Ministry of Education certifying that "[h]is duties included auditing functions of the Cultural Divisions located at our Embassies abroad, and he was

an exemplary employee who displayed seriousness and integrity." (Pl.'s Ex. 4.)

El-Hadad began his employment in the Washington embassy's cultural division in January 1993, pursuant to an express authorization under Article 4 of the Local Employees Laws and Regulations for the UAE Missions Abroad, 1983 ("LER"). (*See* Pl.'s Ex. 12.) His function was to conduct internal auditing of the finances at the cultural attache's office. His duties included the audit and review of all expenditures and accounting methods of the cultural attache and the educational expenditures for the UAE students in the United States, and reconciliation of all bank statements. He supervised eight or more accountants and reported directly to the cultural attache. While employed at the embassy, his salary increases, his promotion, and his annual performance evaluations were authorized under and conformed to the LER.

In late March 1993, El-Hadad took a five-day duly authorized vacation to visit his wife and children, who had remained behind in Abu Dhabi awaiting the end of the school term. While there, the Deputy HESR Minister asked El-Hadad to stay in Abu Dhabi to help with a pressing need in auditing the worldwide cultural divisions, a function the Ministry had recently undertaken and for which they were short-staffed. The record in this case includes the written authorization by the Deputy Minister of HESR with the consent of the embassy's cultural attache assigning El-Hadad to work at the HESR Ministry for three months.

Appendix B

Shortly after he returned to Washington, El-Hadad discovered financial improprieties in the embassy's cultural attache's office there. Specifically, he found a secret account kept and used by the cultural attache and his deputy that four other UAE employees-the chief accountant, two other accountants, and a driver-helped maintain. El-Hadad reported this secret account to the UAE Assistant Minister of Education, who in turn informed the Minister of Finance of the UAE's Ministry of Finance and Industry. The Minister of Finance personally came to the United States and met secretly with El-Hadad to discuss what El-Hadad had discovered. As a result of this meeting, a team of three investigators from the UAE's Ministry of Finance and Industry investigated on-site for ten days in November 1993. The official report of the investigation, issued the next month under the auspices of the Ministry of Finance and Industry, disclosed a total of three secret accounts used to embezzle UAE state funds for private use. It concluded that the cultural attache and his deputy were fully responsible for the misappropriated funds. Citing the limited time constraints of their mission and a deliberate effort by some employees to withhold information, the report concluded that the full amount of the embezzled funds had not been determined, but that at least $2 million had been embezzled. The report recommended the

> formation of a committee chaired by an Attache employee and include the internal auditor, Mohammad El-Hadad and Embassy accountant, Mohammad Imad. Their mission

> would be to correspond with all those institutions [of higher education] to request copies of all Attache pertinent records. This would facilitate a clear accounting of all the refunds received and those deposited to the State treasury account and those that were lost or embezzled.

(Pl.'s Ex. 9, Ministry of Finance and Industry Report, Cultural Attache Auditing, Washington at 24 ¶ 3 ("Investigative Rpt."), Dec. 30, 1993.) El-Hadad did continue the investigation. In his 1993 end-of-year work performance evaluation, El-Hadad was rated as an excellent employee, scoring 99 out of a possible 100 points.

In early 1994, as a result of the findings of this internal investigation, the cultural attache and his deputy were relieved of their positions. In September 1994, the new cultural attache fired the three accountants who had been implicated in the embezzlement. The new cultural attache rated El-Hadad as an excellent employee in his 1994 year-end evaluation, and recommended him for an annual salary increase, a merit bonus, and a promotion. (*See* Pl.'s Exs. 19b, 22.) The Director of Financial and Administrative Affairs for the HESR Ministry approved a salary increase and promotion. (*See* Pl.'s Ex. 24.)

More than a year later, the UAE's State Audit Institution issued its Decision No. 248, "recommend[ing]" that certain disciplinary action be taken against the employees involved in the

embezzlement, most of which had already been meted out some sixteen to twenty months earlier. (Pl.'s Ex. 38, State Audit Institution Decision No. 248 for 1995 ("State Audit Decision No. 248") at 1, Nov. 9, 1995.) In addition, however, State Audit Decision No. 248 recommended that El-Hadad be disciplined, as well:

> e. 1. El-Hadad, auditor at the Cultural Attache's office, . . . be penalized with administrative dismissal without prior notice and to deny him end-of-service benefits for one year in accordance with Article VII item 17[sic][1] and Article XIV item 19[sic][2] of the Local Employees Bylaws for the missions abroad, pursuant to evidence against him of several financial violations as indicated in detail in the investigative memorandum.[3]
>
> 2. He's liable to refund $1557.95 expensed from the State treasury for healthcare coverage to be deducted from his end-of-service bonus.

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1. No such Article and item number in the referenced LER exists. This error is presumed to be an error in translation from the original report which was written in Arabic to the English language version used at trial.

2. See above, note 1.

3. The "investigative memorandum" purporting to contain evidence of El-Hadad's "several financial violations" was not submitted as evidence in this action.

— He's liable to refund $210.17 issued to him erroneously from the State treasury for health care coverage to be deducted from his end-of-service bonus.

— Refund of the travel ticket value differential received for a round trip ticket he purchased, Washington-Abu Dhabi, and what he's entitled to for a one-way ticket, Abu Dhabi-Washington to be deducted from his end-of-service bonus.

(*Id.* at 2, Art. II ¶ 4(e).)[4] A week later, the HESR Minister's Decision No. 257 was issued dismissing El-Hadad and assessing certain monetary penalties against him:

1. Dismissal of Mr. Mohammad Salem El-Hadad, auditor at the Cultural Division in Washington, without prior notice and depriving him from end-of-service compensation for one year, in accordance with the Rules and Regulations contained in the Local Employees Bylaws applicable to the UAE missions abroad, Number 1 for 1983, Article VII, Item 17 and Article XIV Item 19.[5]

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4. Additional allegations of financial improprieties were included in this document, but were not among the reasons ultimately given in the document effecting El-Hadad's penal termination.

5. See above, notes 1 and 2.

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2. The following amounts are to be refunded and deducted from the end-of-service compensation due to him:

> a. $1557.96 for family health coverage differential
>
> b. $210.17 for health insurance paid to the employee from the State treasury
>
> c. Pay back the difference of travel expenses for a round-trip ticket Washington-Abu Dhabi and what he's entitled to as one-way travel Washington-Abu Dhabi.[6]

(Pl.'s Ex. 37, Ministerial Decision No. 257 for 1995 ("Ministerial Decision No. 257"), Art. III, Nov. 16, 1995.) Both State Audit Decision No. 248 and Ministerial Decision No. 257 were disclosed to other officials in the UAE Ministries and the embassy in Washington.

The record contains numerous documents that relate to each of the alleged financial improprieties listed in the State Audit Decision No. 248 and the HESR Ministerial Decision No. 257. (*See, e.g.*, Pl.'s Exs. 9, 17, 18, 23, 39-70, 75, 85.) These documents demonstrate either that the alleged impropriety was not, in fact, improper or that if there was any fault, it lay elsewhere, such as with the embezzlers El-Hadad had detected and

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6. Additional allegations, not ultimately relied on as the basis for terminating El-Hadad were included in this document.

reported in mid-1993. Many of these documents were sent to the State Audit Institution and the HESR Minister or his Director of Financial and Administrative Affairs, to refute the allegations before State Audit Decision No. 248 was issued. Then, after State Audit Decision No. 248 and HESR Ministerial Decision No. 257 were issued, but before the disciplinary recommendations were implemented as to El-Hadad, the UAE's Ambassador to the United States and the new cultural attache each sent multiple letters questioning the decisions, vouching for El-Hadad's integrity, dedication, and competence, and pointing out that the allegations of wrong-doing were not credible in the face of documentary evidence. (*See* Pl.'s Exs. 71-73, 78, 84.) These protests with supporting factual references were sent to the Director of the State Audit Institution and his Deputy, the Minister of HESR, and the Minister of Finance. In particular, the new cultural attache referred to the "untenable injustice" of the recommended discipline against El-Hadad, and concluded that "it is evident that the State Audit Decision . . . needs further review of its recommendations especially since some are in clear violation of the essence and facts of the matter." (Pl.'s Ex. 71, Letter from Cultural Attache to the Deputy of State Audit at 3, Nov. 27, 1995.) The Minister of Finance, whose team had conducted the 10-day embezzlement investigation in November 1993, also intervened on El-Hadad's behalf, sending a letter stating that

> [u]nfortunately the State Audit disregarded our recommendation and instead issued a

> recommendation of disciplinary dismissal from work of Mr. El-Hadad equating him with those employees who were knowingly and premeditatedly embezzling public money for many years although the investigation proved that he was not involved with them.

(Pl.'s Ex. 74, Letter from Minister of Finance to Minister of HESR at 2, Dec. 25, 1995.) In a second letter, the Minister of Finance provided a point-by-point factual refutation of the alleged financial violations purportedly justifying El-Hadad's dismissal and sanctions, and noted that the proposed termination on the basis of the reasons offered would violate the LER that governed El-Hadad's employment. Then, observing that the State Audit Institution had operated with "subjective attitudes" and refused to consider "documents which refute the accusations" against El-Hadad, he stated that "[t]he existing disputes between the Cultural Attache in Washington and the Administrative and Financial Affairs Division at the Ministry of Higher Education and Scientific Research have directly impacted the case of Mr. Mohammed El-Hadad[.] . . . The evidence of that trend is abundant, and its [sic] quite clear in the nature of the accusations leveled against him by the said Division, without any factual or legal basis." (Pl.'s Ex. 85, Letter from Minister of Finance to Minister of HESR at 2 ¶ 4, Feb. 25, 1996.)

These pointed protests emphasizing the absence of factual basis for imposing discipline on El-Hadad did not alter the HESR Minister's position. In early February,

his Director of Financial and Administrative Affairs formally requested the new cultural attache to "resume action towards the implementation of the remaining provisions of Decree No. 257" with respect to El-Hadad. (Pl.'s Ex. 82, Letter from Director of HESR's Financial and Administrative Affairs to Cultural Attache, Washington, February 3, 1996.) On February 26, 1996, the new cultural attache capitulated to the directive of his superior, the HESR Minister, and issued Administrative Decision No. 29, which identified four specific instances of alleged financial impropriety and, with an express reference to the LER, imposed "disciplinary action without warning" on El-Hadad, effective retroactively to February 1, 1996. (Pl.'s Ex. 86, Embassy of the UAE, Cultural Division, Administrative Decision No. 29 ("Administrative Decision No. 29"), Feb. 26, 1996.) Administrative Decision No. 29 reiterated three of the alleged financial improprieties that were previously identified in Decision No. 248 and Decision No. 257, namely, the two claims relating to health insurance premiums and the claim relating to reimbursement for a round-trip instead of one-way air fare. In addition, it included a monetary penalty for $2837.82 due to "unjustified overtime" paid to El-Hadad in late 1994 and early 1995. (Id.)

El-Hadad immediately appealed his dismissal and monetary sanctions. His appeal was forwarded by the Ambassador, who expressed to the Deputy Chief of Audit the "hope that you will rectify the injustice done and reinstate Mr. El Hadad's rights. . . . Furthermore, Mr. El Hadad's performance has been good, sincere and

honest and had been confirmed by his supervisors at the Cultural Attache." (Pl.'s Ex. 87, Letter from the Ambassador to Deputy Chief Audit, Mar. 20, 1996.)

From June to August 1996, El-Hadad worked as auditor for the UAE's military attache. That employment terminated at the direction of government officials in Abu Dhabi who viewed it as a circumvention of the penal termination imposed. (Defs.' Response Pursuant to June 16, 2000 Remand Order, Decl. of Fathalla Al-Meswari ("Al-Meswari Decl.") ¶ 27, Nov. 20, 2000.) El-Hadad filed this lawsuit on August 22, 1996.

Sometime in late summer 1996, HESR's Director of Financial and Administrative Affairs visited the cultural division at the Washington embassy and addressed all twelve to fifteen employees there on the subject of El-Hadad's dismissal. The Director told the employees attending the meeting that El-Hadad had been dismissed because he was not doing his job properly or honestly. (*See* Trial Tr. vol. 1, 76, June 6, 2005.)

Throughout the latter part of 1996 and into 1997, El-Hadad sought work in and around Washington as an auditor or accountant at various Arab-language embassies and Arab-language private schools when he learned of vacancies in his field. None of these opportunities resulted in an offer of employment. In each interview, he was asked why he left his auditor's job at the cultural division. On one occasion, he described his parting from the embassy as a "disagreement," but the prospective employer called the UAE embassy to learn

that El-Hadad had been penally terminated. On another occasion, he showed supportive letters from the UAE Ambassador and the new cultural attache attesting to his competence, integrity, and dedication, but again, he was not offered a position. On still other occasions, after he disclosed the fact of his dismissal, he received neither a follow-up interview nor an offer of employment. In 1997, El-Hadad and his family returned to Egypt. Although he interviewed for accounting and auditing work at hotels, schools, import and export businesses and other firms in Egypt, he was always asked about the circumstances under which his prior employment ended, and he was never offered another position. Ever since he was terminated from the UAE embassy in 1996, El-Hadad has not received a single offer of employment in accounting. His efforts to secure employment outside his field of expertise failed, as well. In 1999, El-Hadad started his own business in cosmetics, which lost money, so he closed the business in 2003. Since being terminated for disciplinary reasons, El-Hadad's reputation as an accountant and auditor has declined, and he has been publicly and privately humiliated and embarrassed due to his unemployment and inability to provide for his family.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PARTIES'S CLAIMS AND DEFENSES

I. SOVEREIGN IMMUNITY FROM SUIT

In their post-trial submission of proposed findings of fact and conclusions of law, defendants argue, as they

have previously, that they are immune from El-Hadad's claims by virtue of the Foreign Sovereign Immunities Act ("FSIA").[7] *See* 28 U.S.C. §§ 1602 *et seq.* El-Hadad has asserted that his employment as auditor falls within the commercial exception to the FSIA. Defendants counter that El-Hadad was a civil servant and therefore the commercial exception does not apply.

A. *Findings of fact*

The UAE, and its Washington embassy, including its cultural division, each qualify as a "foreign state" within the meaning of the FSIA. *Id.* § 1603(a). The cultural attache's office was responsible for administering the UAE government program to support UAE citizens who were students enrolled in colleges in the United States. El-Hadad, a citizen of Egypt, was hired by the UAE embassy to serve as an internal auditor of accounts of the cultural attache's office. In carrying out his duties, he audited and reviewed the expenditures and accounting methods of the cultural attache and the

7. The issue defendants raise post-trial has been aired and considered multiple times in this case. In August 1999, Judge Stanley Harris determined that El-Hadad's position as auditor fell within the commercial activity exception of the FSIA. Defendants took an interlocutory appeal, and the issue was remanded for a decision consistent with the D.C. Circuit's opinion. After Judge Harris' retirement, this court, specifically addressing the material factors identified by the D.C. Circuit, again determined that El-Hadad's position as auditor fell within the commercial activity exception to the FSIA. The evidence introduced at trial has only reinforced that decision.

educational expenditures for the UAE students in this country. He also reconciled all bank statements for the cultural attache's office. In this position, El-Hadad was promoted and paid in accord with a grade and step salary system.

The defendants' witness, a legal advisor to the UAE embassy who holds an advanced degree in law, has declared that the United Arab Emirates law does not define the term "civil service" or use the term "civil servant." (Al-Meswari Decl. ¶ 10). The record in this case contains many documents expressly applying certain provisions of the LER to El-Hadad, yet not one document that expressly applies any civil service law to him. The translated LER itself contains just two references to civil service status, neither of which could apply to El-Hadad, because they are expressly restricted to UAE citizens and El-Hadad is not a UAE citizen. (*See* LER, Art. 20/2 ("UAE citizens are subject to the system of salaries, compensation, and retirement pay of the civil service employees enacted in the UAE.") & Art. 20/3 ("In the event of classifying a UAE citizen to civil servant, his employment is considered continuous from the time of his appointment as a local employee on the condition that he is not paid the compensation of the end of his service.").) The LER contains no provision that states or suggests that a non-UAE citizen could receive civil service benefits or be classified as a civil servant. A letter from the cultural attache noted that El-Hadad's position as accounting auditor did not have civil service benefits. (*See* Pl.'s Reply Pursuant to June 16, 2000 Remand Order, Ex. 1, Letter from Cultural Attache, Dec. 9, 1994.)

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The characteristics of El-Hadad's activities as an auditor do not bear the earmarks of a civil servant. The record provides no evidence that El-Hadad had any more discretion in conducting his audits or that he executed his duties with any more state authority than an external auditor on contract would have had. El-Hadad had no role in the creation or administration of government policy. He was not privy to political deliberations or government decision-making. He did not represent or act or speak for the UAE government in his dealings with others. His duties, although important and involving large sums of money, were ministerial, not discretionary.

B. *Conclusions of law*

Subject to specific exceptions, the FSIA allows foreign states immunity from suit in federal and state courts. 28 U.S.C. § 1602 *et seq.* The FSIA does not recognize a foreign state's immunity if "the action is based upon a commercial activity carried on in the United States by the foreign state [.]" *Id.* § 1605(a)(2). In this case, "the immunity exception depends solely on whether the action is based upon a 'commercial activity[.]' " *El-Hadad v. Embassy of the United Arab Emirates*, 216 F.3d 29, 33 (D.C.Cir.2000). Thus, "[t]he ultimate question to be answered is whether El-Hadad's employment constituted commercial activity." *Id.* at 34. Defendants have the ultimate burden of persuasion that the exception does not apply. *See El-Hadad v. Embassy of the United Arab Emirates*, 69 F.Supp.2d 69, 73 (D.D.C.1999) (citing *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1171 (D.C.Cir.1994)).

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For purposes of the FSIA,

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

Id. § 1603(d). The Supreme Court, observing that the statutory definition "leaves the term 'commercial' largely undefined," has identified the key determinant of commercial activities. *Republic of Argentina v. Weltover*, 504 U.S. 607, 613, 112 S.Ct. 2160, 119 L.Ed.2d 394, (1992). "A foreign state engaging in 'commercial' activities 'do[es] not exercise powers peculiar to sovereigns"; rather, it 'exercise[s] only those powers that can also be exercised by private citizens." *Id.* at 614 (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976)).

In his job at the cultural attache's office, El-Hadad audited and reviewed expenditures and accounting methods and reconciled bank statements. Whether conducting audits and employing auditors to conduct them constitutes a commercial exception as defined by the FSIA appears to be a matter of first impression. The plain language of the statute, though, easily guides this determination, just as it has guided other courts where activity giving rise to suits was activity commonly

engaged in by private parties in commerce or trade.[8] Audits and auditors are an integral part of a regular course of commercial conduct. The orderly conduct of commerce and trade depends on audits and auditors. There is nothing about auditing expenditures, reviewing accounting methods, reconciling bank statements or employing auditors to conduct these activities that is an attribute unique to the governance of a sovereign state. When a foreign state hires an auditor to conduct an internal audit of its finances, it is exercising only those powers that can also be, and routinely are, exercised by

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8. *See, e.g.*, *BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 686 (8th Cir.2002) (noting that attempts by agents of a state-owned enterprise to contact American vendors to produce goods needed to build a plant were "obviously 'commercial' in character"); *Daly v. Castro Llanes*, 30 F.Supp.2d 407, 418 (S.D.N.Y.1998) ("It can hardly be argued that accepting bank deposits . . . [on a commercial basis] is not an act of a commercial character. Common banking activities are not ordinarily exclusively within the 'peculiar powers' of a sovereign, and these activities are precisely the type of actions by which a private party can be understood to be engaging in 'trade and commerce.' "); *Los Angeles News Serv. v. Conus Commc'ns Co. Ltd. P'ship*, 969 F.Supp. 579, 585-86 (C.D.Cal.1997) (finding that broadcasting television news by a state-owned broadcast corporation is a commercial activity under FSIA because it is the "type of activity customarily carried on for profit by private individuals and corporations" (internal quotations omitted)); *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1384-85 (5th Cir.1992) (noting that contracts by a foreign sovereign for goods and services "typically" satisfy the commercial activity requirement of the FSIA, and a contract that is "indistinguishable from a contract entered into between two private entities" is within the commercial exception).

private citizens engaged in commerce. *See Weltover*, 504 U.S. at 614. Thus, the plain language of the FSIA statute leads to the conclusion that El-Hadad's employment as an internal auditor of accounts was a commercial activity, as that term is defined by the FSIA.

Defendants' attempt to take this case outside of the commercial activity exception by characterizing El-Hadad as a "civil servant" is unpersuasive. The factual record does not establish what a UAE civil servant is or that El-Hadad qualified as a civil servant in the UAE's employ. Defendants, relying on *Kato v. Ishihara*, 360 F.3d 106, 109 (2d Cir.2004), argue that the fact that El-Hadad's salary and promotions were based on a "grade" and "step" salary system and the fact that he took a competitive examination in order to qualify for his first position as a UAE employee, is evidence that he was a civil servant. (*See* Defs.' Post-Trial Proposed Findings of Fact and Conclusions of Law ("Defs.' Post-Trial Subm.") at 15.) Defendants' position, however, is not supported by the opinion in *Kato*. Rather, that court concluded that when "determining whether a foreign government's employment of personnel in the United States is 'civil service' and therefore 'governmental,' we do not look principally to whether that employment resembles the contemporary civil service of the American democracy, but we instead inquire whether 'the particular actions that the foreign state performs [through that employee] . . . are the type of actions by which a private party engages in "trade and traffic or commerce." " '*Kato*, 360 F.3d at 114 (quoting *Weltover*, 504 U.S. at 614). The type of services an auditor performs

are the type by which a private party engages in trade or commerce. Moreover, a standardized grade/step salary system and a competitive qualifying examination are features of employment that are by no means unique to governmental civil service employment, but are common to employers engaged in private commerce as well.[9]

Defendants have failed to establish facts sufficient to show that El-Hadad was a civil servant in the UAE's employ. Because defendants have not met their burden of showing that El-Hadad's employment as an auditor is not commercial, defendants' defense of sovereign immunity fails.

II. BREACH OF CONTRACT

El-Hadad argues that he had an employment contract for permanent employment that was governed by the terms of the LER, and that defendants violated that contract when they dismissed him on trumped up

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9. Defendants also argue that the fact that El-Hadad did not sign an employment contract but instead relies on the LER to establish a contract supports their position that he is a civil servant. (Defs.' Post-Trial Subm. at 15-16.) Defendants do not explain why the absence of a written contract and El-Hadad's reliance on the LER tends to indicate that he is a civil servant, and it is not obvious. By its own terms, the LER applies to both civil servants and to others, but the only two references in the LER to civil servants support a conclusion that El-Hadad, a non-UAE citizen, was not a civil servant. (See LER, Arts. 20/2, 20/3 (quoted above).)

reasons that had no basis in fact. Defendants argue that the employment contract was an at-will contract, allowing them to terminate El-Hadad at any time for any reason or for no reason.

A. *Findings of fact*

Before accepting the position in Washington, El-Hadad discussed his employment with the cultural attache and the deputy cultural attache over several weeks. They told him specifically that his employment would be permanent, which he understood to mean until his death, retirement, or termination for cause. El-Hadad credibly testified that he would not have given up a secure position and undertaken the expense of moving himself and his family from the UAE to the United States for a position that was not permanent. Defendants offered no rebuttal on this point.

Due to the prior ten years he spent auditing the accounts of cultural divisions worldwide with the Ministry of Education, El-Hadad was already familiar with the LER. The LER, by its express terms, governs the hiring, annual pay, salary increases, overtime pay, vacation and other leave, and per diem allowances for approved business travel of local employees in UAE missions abroad. The LER also specifies the local employee's obligations to his employer and the disciplinary measures the employer is authorized to use for violations of an employee's obligations. El-Hadad knew before accepting the position that the LER would apply to the person hired as the Washington embassy's

cultural division's auditor. El-Hadad's appointing document expressly refers to Article 4 of the LER, which authorizes hiring local employees who are not nationals of the host country, and states that "[b]ringing an employee from outside the [host] country ... does not alter his status as a local employee. He is completely bound by the provisions of the Local Employee Regulations...." (LER, Art. 4/6/3.) El-Hadad's written yearly performance evaluations identified him as a "local employee" and precisely conformed to the LER's requirements for annual employee evaluations. His pay raises and promotion were authorized and awarded by express reference to the LER. And, in the end, the official documents directing and effecting El-Hadad's termination expressly referenced authority under the LER. At the time El-Hadad was appointed and for the duration of his employment as auditor in the cultural division, both the defendants and El-Hadad viewed his position as permanent and intended the provisions of the LER, including the provisions for termination for disciplinary reasons codified in LER's Article 17, to apply to El-Hadad's employment. (*See* LER Art. 17.)

Defendants penally terminated El-Hadad's employment for the reasons stated in Administrative Decision No. 29, which expressly referred to the LER, the State Audit Decision No. 248 and the HESR's Ministerial Decision No. 257, and identified the following amounts to be charged against El-Hadad:

1. $1577.95	Representing an outstanding amount on his health insurance policy

2. $210.17	Representing a payment towards his health insurance premium
3. $1225.00	His return airway ticket (Washington-U.A.E.-Washington)
4. $2837.82	Unjustified overtime paid to him for the period (October/November/December 94 & January 95)

(Administrative Decision No. 29.)

As to the $1,557.95 for the health insurance policy, this sum was part of the money embezzled by the cultural division's chief accountant in the embezzlement scheme that El-Hadad detected and reported in the first few months of his employment there, precipitating the termination of the chief accountant and others involved in the scheme. The embezzlement scheme encompassed many angles,[10] one of which related to family health insurance monthly premiums. The UAE paid only for the individual employee's health plan. An individual employee with a family who elected family coverage paid the difference out of pocket and remitted the payment

10. For example, a major part of the embezzlement scheme involved diverting into one of the three secret accounts refunds from U.S. colleges and universities when a UAE student withdrew from courses or from school, which rightly belonged to the UAE.

to the chief accountant. The chief accountant, however, secretly diverted the money received from the employees to one of the secret accounts and paid the full cost of the family health plans from state funds. (*See* Investigative Rpt. at 9, ¶¶ 1.a & 1.b, and at 11, ¶ 4.) El-Hadad and other employees, one of whom testified at trial, were unwitting pawns in this scheme. (Trial Tr., vol. 1, 96-97, June 6, 2005; see also Pl.'s Exs. 40, 41, 46.) El-Hadad did not benefit from this scheme. The scheme long predated El-Hadad's arrival at the embassy. He had no role in it except to report it when he discovered it. There is no factual basis in this record for finding that El-Hadad engaged in any wrongdoing with respect to this sum.

As to the $210.17 for his health insurance premium, it is undisputed that El-Hadad was entitled either to enroll in individual health care coverage or receive in lieu of the insurance a $100 "medical bonus." (*See* LER Art. 12; Pl.'s Ex. 85, Letter from Minister of Finance to Minister of HESR at 7-8, Feb. 25, 1996.) It is also undisputed that he timely opted for enrollment in the health insurance benefit, but by mistake was not enrolled in the first month. When the error was discovered, the then-cultural attache authorized a payment of $310.17, the cost of the premium for an individual for one month. The $210.17 represents the difference between the cost of the month's premium and the medical bonus he could have elected, but did not. (*See* Pl.'s Ex. 85 at 7.) El-Hadad engaged in no impropriety with respect to this sum. (*See* Pl.'s Ex. 71 at 2.)

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The facts are not in dispute as to the reimbursement for the airline ticket. The Ministry of Finance and Industry authorized the reimbursement. (*See* Pl.'s Ex. 85 at 6; Pl.'s Ex. 71 at 2-3.) While in Abu Dhabi to visit his family, El-Hadad agreed, at the request of the Deputy HESR Minister and with the consent of his embassy superiors, to stay in Abu Dhabi for a time to help with audits because HESR was understaffed and El-Hadad had experience in these audits. El-Hadad, as a local employee in Washington, was entitled to a round-trip airline ticket for this official business. (*See* Pl.'s Ex. 85 at 5-6.) In addition, he was entitled to a housing and food allowance as well as an additional per diem allowance. (*See id.* at 3-4.) El-Hadad declined the food and housing allowance while he worked for the HESR Minister, and accepted the per diem allowance and the reimbursement for the round-trip air fare, authorized by the Minister of Finance. (*See id.*) As the Minister of Finance pointed out to the Minister of HESR more than two years after the fact when reasons to dismiss El-Hadad were being developed, El-Hadad received far less than he was entitled to receive under the rules, and the expense was sound in light of HESR's pressing need for assistance. (*See id.* at 4.) The record evidence does not support a conclusion that El-Hadad misappropriated funds by accepting a duly authorized reimbursement for a round-trip air fare between Washington and Abu Dhabi.

Finally, as to the $2,837.82 paid for overtime, the paper trail leaves no doubt. The new cultural attache gave written advance authorization to El-Hadad to work overtime in the months of October, November, and

December 1994 and January 1995. (*See* Pl.'s Exs. 55, 56.) El-Hadad credibly testified that, in fact, he worked the overtime hours for which he was paid. Correspondence from the HESR Director of Financial and Administrative Affairs, the same official who told the employees in the cultural division that El-Hadad had not done his job properly or honestly, establishes that the LER permits pay for overtime, provided it is not a duplicative payment for the same hours worked. (*See* Pl.'s Ex. 54.) There is nothing in the record to raise any suspicion of duplicative payments. The evidence affords no basis for the conclusion that El-Hadad acted improperly in this regard or misappropriated funds paid to him for overtime work.

El-Hadad established by credible testimony that he attempted to mitigate his damages but was unsuccessful. He has not received any offer of employment in his field of expertise or otherwise. His attempt at self-employment was unsuccessful as well, as he lost money on his business venture. The experience of the last decade supports the conclusion that El-Hadad is unlikely to obtain employment and mitigate future damages from this point forward. Defendants have not shown otherwise. It is undisputed that El-Hadad earned wages from the UAE in June, July and August 1996 while working for the military attache, but the amount is not in evidence. Defendants have established that El-Hadad earned income in Egypt when he worked for his own cosmetic business. This income, however, was generated through self-employment in a business that lost money, and thus did not mitigate El-Hadad's damages.

B. *Conclusions of law*

District of Columbia law presumes that employment contracts are terminable at will unless it is clear that the parties intended otherwise. *Nickens v. Labor Agency of Metropolitan Washington*, 600 A.2d 813, 816 (D.C.1991). The at-will presumption may be overcome by an oral agreement. *See Hodge v. Evans Financial Corp.*, 823 F.2d 559 (D.C.Cir.1987) (holding that statute of frauds did not render an oral contract for permanent employment unenforceable and finding that the evidence established an oral contract for permanent employment); *Rinck v. Assoc. of Reserve City Bankers*, 676 A.2d 12, 16 (D.C.1996) (concluding that an employer's statement that an anticipated merger would not result in employee's termination was sufficiently clear and specific to create an enforceable term of the employee's contract and negating the presumption of an at-will contract). A writing containing specific preconditions that must be met before employment may be terminated is also sufficient to overcome the presumption of an at-will contract. *See Rinck*, 676 A.2d at 16 (citing *Washington Welfare Ass'n v. Wheeler*, 496 A.2d 613, 616 (D.C.1985)); accord *Strauss v. Kaiser Foundation Health Plan of Mid-Atlantic*, 744 A.2d 1000, 1011 (D.C.2000) (citing *Nickens*, 600 A.2d at 816, and *Washington Welfare Ass'n*, 496 A.2d at 616). A general reference, either written or oral, to "permanent employees," or general discussions of reasons for termination are not sufficiently specific, though, to establish that the parties intended something other than an at-will contract. *See Rinck*, 676 A.2d at 16 (citing *Perkins v. Gov't Employees Federal Credit Union*, 653 A.2d 842, 843 (D.C.1995)).

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Under District of Columbia law on employment contracts, the first question for the fact-finder in this case is whether the LER's provisions governing termination are sufficiently specific with respect to required preconditions to overcome the presumption of at-will employment and to create enforceable terms of the employment contract. *See Washington Welfare Ass'n*, 496 A.2d at 615, 616. The LER imposes the following specific preconditions for a disciplinary termination:

The employee may be dismissed for disciplinary reasons without notice in the following circumstances:

17/7/1:	If the violations committed severely impact[ ] the Mission's interest.
17/7/2:	Destruction of valuables due to dereliction of duties resulting in substantial loss to the Mission. (Article 18/8 [sic]).[11]
17/7/3:	Violation of duties as described in Article 16/9 concerning preservation of official documents and the [secrecy][12] of their contents.

11. The reference to Article 18/8 appears to be a typographical error in translation. There is no Article 18/8, and Article 16/8 states the corresponding employee obligation to "[p]rotect the financial interests of the Mission and its property."

12. The translated text provided to the court uses the term "secretary," but it is presumed that this word is a typographical error in translation and the intended word is "secrecy."

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17/7/4: Violates the conduct code or harms the Mission's ethical reputation (Article 16/10).

17/7/5: Repetition of an earlier violation for which he received a warning (Article 17/5).

(LER, Art. 17/7.) These provisions are specific enough to establish preconditions without which dismissal for disciplinary reasons without notice would constitute a breach of the terms of the employment contract. El-Hadad's employment contract with the UAE embassy was not an at-will contract.

The second question for the fact-finder is whether defendants established any of the preconditions for dismissal for disciplinary reasons without notice or whether, as El-Hadad claims, the defendants breached the employment contract when they terminated him and assessed certain monetary penalties against him. The defendants gave four specific reasons for firing El-Hadad in Administrative Decision No. 29. The abundant documentary record evidence, most of which was created contemporaneously with the alleged financial improprieties, convincingly refutes each allegation of impropriety. The evidence establishes that the defendants' four stated reasons for dismissing El-Hadad without notice for disciplinary reasons were at least false, and were at worst pretextual. Under these circumstances, El-Hadad's dismissal constituted a breach of his employment contract.

El-Hadad is entitled to ordinary damages resulting from defendants' breach of contract. "The plaintiff in a contract action 'is not required to prove the amount of his damages precisely; however the fact of damage and a reasonable estimate must be established.' " *Hodge*, 823 F.2d at 570 (quoting *W.G. Cornell Co. v. Ceramic Coating Co.*, 626 F.2d 990, 993 (D.C.Cir.1980)). Any award is subject to a discount for mitigation.[13]

> The measure of damages in an employee's action against his employer for breach of the employment contract is generally the compensation "that would have been due to the employee during the unexpired period of employment with appropriate reduction to present worth." . . . This prima facie evidence entitlement, though, is subject to the defense of mitigation of damages: "If the employee has obtained a substitute job, or could obtain one by reasonable effort, he is chargeable with the income he obtains or reasonably could obtain in this fashion, but only if the employer sustains the burden of proving these facts."

Hodge, 823 F.2d at 569 (quoting *District of Columbia v. Jones*, 442 A.2d 512, 524 (D.C.1982) (quoting D. Dobbs, Law of Remedies § 12.25 at 924-25 (1973)) (citations omitted)). Although defendants established that

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13. Plaintiff is also entitled to consequential damages resulting from the breach, but none have been pled. *See Hodge*, 823 F.2d at 570.

El-Hadad mitigated his damages through his work with the military attache in the summer of 1996, they have not established the amount of mitigation.

El-Hadad is entitled to damages consisting of lost wages, including estimated annual pay increases added to his base salary, the cash equivalent of benefits provided pursuant to the terms of the LER, end of service compensation as authorized by the LER, and unused vacation leave until retirement age, which the LER sets at age 65. El-Hadad was fired approximately twenty-three and one-half years before his 65th birthday.

Defendants do not challenge plaintiff's damages calculations. Plaintiff's damages submission is based on a twenty-five year projection, rather than a twenty-three and one-half year projection. Thus, it overestimates the damages by about six percent. It also appears to double-count wages for certain periods. Specifically, El-Hadad's February 1996 salary is already included in the base salary calculation. (*See* Pl.'s Post-trial Proposed Findings of Fact and Conclusions of Law, ¶ 111). However, plaintiff's submission then counts again a month's pay for February 1996, for which El-Hadad worked but was not paid, because he was terminated late in February effective retroactively to the first day of the month. In addition, plaintiff's submission includes a month's pay to cover a 30-day notice of termination to which plaintiff asserts he was entitled. (*See id.*, ¶¶ 114-115.) El-Hadad is not due a month's salary for notice of termination if he is to be compensated as if he had not been terminated, which is the premise on which the damages calculation

is based. Plaintiff's contract damages calculation has been adjusted downward accordingly, resulting in a figure of $1,245,961.[14]

Under District of Columbia law, "the court has ample discretion to include prejudgment interest 'as an element in the damages awarded, if necessary to fully compensate the plaintiff.' " *Federal Marketing Co. v. Virginia Impression Products Co., Inc.*, 823 A.2d 513, 532 (D.C.2003) (quoting D.C.Code § 15-109). See also D.C.Code § 05-109; *Duggan v. Keto*, 554 A.2d 1126, 1140 (D.C.1989) (interpreting D.C.Code § 15-109). "The purpose of awarding prejudgment interest as part of the damages for breach of contract is to compensate the creditor for the loss of the use of money over time. . . . The court should usually award such 'delay damages' in such cases 'absent some justification for withholding such an award.' " *Fed. Marketing Co.*, 823 A.2d at 531-32 (quoting *Gen. Motors Corp. v. Devex Corp.*, 461 U.S. 648, 103 S.Ct. 2058, 76 L.Ed.2d 211 (1983)) (internal citations omitted). The rate of prejudgment interest to

14. This calculation is comprised of three components: (1) the salary El-Hadad was making when dismissed, plus an estimated annual increase of $1,200 each year for twenty-three years, and the cash equivalent of the health premium fringe benefit for the employed individual, amounting to $1,147,296; (2) the unused vacation leave for which El-Hadad was not compensated, amounting to $4,496; (3) the end of service compensation calculated to the point in time at which he was dismissed ($8,574) plus the end of service compensation he would have earned on his salary had he worked as projected until age 65 ($85,595), amounting to $94,169.

be applied in this case is specified in D.C.Code § 28-3302(c). *See* D.C.Code §§ 15-109, 28-3302(c). Accordingly, in order to be made whole, El-Hadad is entitled to prejudgment interest at the statutory rate specified in § 28-3302(c) on the damages representing the wages and benefits that El-Hadad would have received, if he had not been terminated, from February 1, 1996 to the date the award is paid.

III. DEFAMATION

El-Hadad has sued for defamation and urges this court to adopt a compelled self-publication theory of defamation. Defendant UAE relies on a defense of privilege to El-Hadad's evidence of slander and a defense of no publication to El-Hadad's evidence of libel.

A. *Findings of fact*

Defendant UAE made false and defamatory statements about El-Hadad that were memorialized in multiple documents, including State Audit Decision No. 248 and HESR Ministerial Decision No. 257. It is evident from the face of those two documents, and it is uncontested, that these documents were published to persons other than the defamed person himself. In addition, after El-Hadad was fired, the Director of HESR's Financial and Administrative Affairs told several employees in the cultural division at the Washington embassy that El-Hadad had been dismissed because he was not doing his job properly or honestly.

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Prior to his dismissal, El-Hadad had been continuously employed in his profession and judged to be an excellent and exemplary auditor. Ever since he was fired by defendants, he has not had a single offer of employment in his chosen profession. His efforts to find employment have been frustrated by the fact that he was dismissed for dishonesty, a trait incompatible with his profession as auditor and accountant, and a fact he is compelled to disclose at each job interview or risk demonstrating a lack of candor if he declines to disclose the fact and then it is discovered. This Hobson's choice forces El-Hadad, in effect, to republish the defamation.

For the past ten years, El-Hadad has been deprived of the satisfaction of work in his chosen profession and deprived of enjoying the respect he was accorded for his work and for being gainfully employed. He has been unable to take pride in providing for his family as expected or to realize the satisfaction and fulfillment of giving his children the advantages in life he had reasonably hoped to give them. Instead, he has had to suffer the private and public embarrassment of relying on others for his own welfare rather than providing for theirs. There is no basis to expect that his future employment prospects will be materially different from his experience in the past decade.

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B. *Conclusions of law*

To prove defamation in the District of Columbia, a plaintiff must prove

> "(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm."

Oparaugo v. Watts, 884 A.2d 63, 76 (D.C.2005) (quoting *Crowley v. North Am. Telecomms. Ass'n*, 691 A.2d 1169, 1173 n. 2 (D.C.1997)); *see also*, Restatement (Second) Torts ("Restatement") § 558 (1977). The factfinder determines the truth or falsity of the alleged defamation and, if it is false, whether the statement is defamatory. *See Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1577 (D.C.Cir.1984), *rev'd on other grounds*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A statement is defamatory if it " 'tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of [his] community. ' ". *Olinger v. Am. Sv. & Loan Ass'n*, 409 F.2d 142, 144 (D.C.Cir.1969) (quoting *Afro-American Publ'g Co. v. Jaffe*, 366 F.2d 649, 654 (D.C.Cir.1966)). *See also* Restatement § 559 (defining defamatory communications).

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Written or broadcast defamation is known as libel. *See* Restatement §§ 568(1) & 568A. Spoken defamation that is not broadcast is known as slander. *See id.* § 568(2). Libel is defamation per se, regardless of the nature of the false and defamatory statements. *See id.* § 569. Slander constitutes defamation per se if the nature of the slander concerns a matter that is incompatible with the profession of the person slandered. *See id.* § 570(c). Whether a defamatory statement identifies a trait or characteristic incompatible with a profession is a determination for the factfinder to make. *See id.* § 615(2).

Defamation per se renders a defendant liable for general damages even where no special damages are proved. *See id.* § 569 cmt. b. Special damages differ from general damages in that special damages relate to the loss of things that have economic or pecuniary value. *See id.* § 575 cmt. b. General damages are not limited to things with economic value, but also include impairment to reputation and standing in the community, personal humiliation, mental anguish and suffering. See id. § 621 cmt. b; *see also, e.g.*, Minn. Prac. Civ. Jury Instruction Guides § 50.50; NY Pattern Civil Jury Instructions § 3:29. Where a plaintiff is neither a public official nor a public figure, and where the defamatory statements involve no issue of general public importance, proof of defamation per se entitles the injured party to presumed general damages, that is, the general damages may be presumed and do not have to be proved. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757, 760-61, 763, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) ("We conclude that permitting recovery of presumed and

punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern.").[15] Because El-Hadad was a private, not public, individual and the statements at issue did not involve a matter of general public interest, proof of defamation per se would entitle El-Hadad to presumed general damages.[16]

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15. Punitive damages against a foreign state are not permitted under the FSIA. *See* 28 U.S.C. § 1606; *see also* Order, September 23, 2002, granting defendants' motion for summary judgment as to punitive damages in this matter.

16. In other cases distinguishable from this one because they implicated First Amendment concerns, the Supreme Court found that the Constitution prohibited recovery of damages for defamation per se absent certain findings. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court held that the Constitution required proof that the publisher was at least negligent and proof of actual damage if the defamatory statements involved a subject of general public importance. And, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Court required in cases where the plaintiff was a public official and the defamatory statements involved a matter of public or general interest, proof that the publisher made the statement with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Neither of these cases states rules applicable to this case, which does not raise heightened First Amendment concerns and involves neither a public figure nor defamatory statements on a subject of general public interest.

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The factfinder determines the amount of the plaintiff's general damages, whether presumed or proved. *See* Restatement § 616. Awards for injury to reputation, humiliation and mental anguish are not susceptible of precise estimation and proof, which is the very reason the common law historically permitted the damage from defamation per se to be presumed. "[S]tatements that are defamatory per se by their very nature are likely to cause mental and emotional distress, as well as injury to reputation, so there arguably is little reason to require proof of this kind of injury either." *Carey v. Piphus*, 435 U.S. 247, 262, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (discussing the doctrine of presumed damages in the common law of defamation per se). "[T]he experience and judgment of history [shows] that proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of the publication, it is all but certain that serious harm has resulted in fact." *Dun & Bradstreet*, 472 U.S. at 760 (quotations and citation omitted). Factors considered in determining the amount of presumed damages include the reputation of the defamed party prior to the defamation, the probable as well as proved effect of the defamation on his profession, how widely the defamation was disseminated, the duration of the effect of the defamation, and whether there has been a timely and effective retraction and apology, but the motive and purpose of the publisher is not to be considered in presumed damages. *See* Restatement (First) of Torts § 621 cmt. c (1938).

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In establishing a basis for dismissing El-Hadad, the UAE made written statements to the effect that El-Hadad had committed financial violations warranting penal termination. The record evidence demonstrates that these statements are false. They are also defamatory on their face in that they tended to expose El-Hadad to contempt, injure him in his accounting profession, and lower him in the estimation of the community of Arab-language embassies in Washington D.C. and his home community in Egypt. These false and defamatory statements were memorialized in multiple documents, including State Audit Decision No. 248 and HESR Ministerial Decision No. 257. These two documents were published to persons other than the defamed person himself. See Restatement § 577 cmt. i ("The communication within the scope of his employment by one agent to another agent of the same principal is a publication not only by the first agent but also by the principal and this is true whether the principal is an individual, a partnership or a corporation."). The UAE did not raise any defenses as to the publication of these two documents.[17] Officials in the UAE goverment to whom the defamatory statements were published included the HESR Minister, his Deputy, and his Director of Financial and Administrative Affairs, and the State Audit Institution's Head and his Deputy. These same UAE officials had been informed that the

17. Defendants correctly argue that plaintiff failed to establish that Administrative Decision No. 29 was ever published to a third person, but are silent as to any defense with respect to State Audit Decision No. 248 and HESR Ministerial Decision No. 257.

documentary evidence did not support a conclusion that El-Hadad had engaged in financial improprieties. They had been informed by multiple sources from the UAE embassy in Washington as well as the Minister of Finance in Abu Dhabi, both orally and in writing, and both before and after the libel issued. They had been supplied with the pertinent documentary evidence on multiple occasions from various sources. In the face of this evidence, the UAE persisted in the libel. The UAE's conduct in this regard constitutes more than negligence. It constitutes at least a reckless disregard for the truth, if not clear knowledge that it was publishing false statements. Defendant UAE libeled El-Hadad, which constitutes defamation per se and entitles El-Hadad to presumed general damages. *See Dun & Bradstreet*, 472 U.S. at 763; Restatement §§ 569, 621; Restatement (First) of Torts § 621.

Several months after El-Hadad had been fired, the HESR Director of Financial and Administrative Affairs told several employees in the cultural division in Washington that El-Hadad had been terminated because he was not doing his job properly or honestly. The Director's statement was false and defamatory and the Director published it to others. *See* Restatement § 577 cmt. i. Because the Director was one of those persons who had been informed that the allegations of El-Hadad's dishonesty had no factual support (*see* Pl.'s Exs. 39, 81), and because the Director reported to and took direction from his superiors who had been so informed (*see* Pl.'s Exs. 73, 74, 75, 76, 84, 85), the Director acted with at least reckless disregard for the truth in making

his statement impugning El-Hadad's competence and honesty. Dishonesty, and perhaps incompetence, is a matter that is incompatible with the profession of accountant or auditor, rendering the Director's slander defamation per se. *See* Restatement § 570(c).

Defendant UAE asserts a "common interest" privilege defense as to the Director's slander.

> To come within the protection of the "common interest" privilege, the statement must have been (1) made in good faith, (2) on a subject in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty to a person having a corresponding interest or duty, (3) to a person who has such a corresponding interest.

Moss v. Stockard, 580 A.2d 1011, 1024 (D.C.1990); *see also* Restatement § 596. For example, a partner in a partnership is entitled to know why an employee of the partnership was terminated. *See* Restatement § 596 cmt. c. The defendant bears the burden of proving the privilege. *See id.* § 613 cmt. i.

Here, the UAE has not articulated the nature of the common interest it claims. It is not obvious that all the employees in the cultural division had, or that the Director believed they had, a legitimate interest that corresponded to the UAE's interest in the basis for El-Hadad's dismissal. *See Moss*, 580 A.2d at 1024. A meeting

held several months after the fact "for the specific purpose of alerting the staff of the termination" (Def.'s Proposed Findings of Fact and Conclusions of Law at 40) does not establish that all recipients of the published defamatory statements shared a legitimate and reciprocal common interest in knowing that the reason for El-Hadad's termination was that he was not doing his job properly or honestly. *See* Restatement § 596 (discussing the common interest privilege).

In addition, the common interest privilege applies only to statements made in good faith, which does not describe this situation. *See Washburn v. Lavoie*, 357 F.Supp.2d 210, 213 n. 4 (D.D.C.2004) (quoting Moss, 580 A.2d at 1024). The common interest privilege does not sanitize the publication of statements made with reckless disregard for their falsity. Even if the UAE had identified a legitimate common interest, the privilege's protection was lost because the Director spoke to the employees either with knowledge that the statements were false or with reckless disregard as to the falsity of the matter. *See* Restatement §§ 595 cmt. a, 600-602.

Plaintiff argues that this court should recognize the theory of compelled self-publication in this instance. The theory of compelled self-publication holds that when, as here, the defendant has put the plaintiff in the position of having no choice but to repeat the defamatory statements in order to either defend himself or mitigate his damages, the defendant should be liable for the publication, even though it came from the mouth of the plaintiff. While some courts permit compelled self-

publication to establish a claim for defamation, it is not a widely accepted theory. *See Atkins v. Indus. Telecomms. Ass'n, Inc.*, 660 A.2d 885, 895 (D.C.1995) (explaining that the self-publication theory has not been widely accepted). The question in the District of Columbia apparently remains open.[18] Under these circumstances, where the UAE is liable for defamation per se and El-Hadad's recovery would be the same even if this jurisdiction recognized the theory of compelled self-publication, there is no need to predict whether the District of Columbia would adopt the theory.

El-Hadad has proved defamation per se and is entitled to recover general presumed damages. *See Dun & Bradstreet*, 472 U.S. at 763. While he is not entitled to recover any damages that duplicate the contract damages awarded, he is entitled to recover that portion of general damages for the defamation per se that is not compensated by the contract damages award, including humiliation, embarrassment, mental anguish, and injury to reputation. *See* Restatement § 621. Although El-Hadad is entitled to presumed damages, he has offered evidence to prove damages for loss of reputation and

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18. *See Vitikacs v. The American Legion*, No. 02-CA-0202, 2003 WL 22004935, *4 (D.C.Super. June 8, 2003) ("The Court need not decide at this time whether under District of Columbia law a defamation claim can be based upon a theory of compelled self-publication. . . . If [plaintiff] is able to present evidence of a compelled self-publication of the discharge letter, then the Court will decide the legal question of whether such alleged self-publication is sufficient to state a claim of defamation under District of Columbia law.").

standing in his professional community, as well as humiliation and mental anguish. The UAE has not offered any evidence to rebut El-Hadad's testimony in this regard.

Defendants' conduct destroyed El-Hadad's professional life almost 24 years before his retirement age. El-Hadad seeks an additional $500,000 for injury to his good name and reputation, for the related mental anguish, distress and humiliation, and for any related monetary loss. El-Hadad's professional reputation before the defamation had been stellar and since the defamation, he has been unable to secure any employment in his profession. The defamation has followed, and will follow, El-Hadad wherever he goes in search of employment. The humiliating effects of the defamation have already lasted ten years, and there is no reason to expect a change. An early retraction and apology might have limited the damage, but there was no timely retraction or apology from the UAE. In light of the devastating effect of the defamation on El-Hadad's professional life and the related ignominy and humiliation he has suffered undeservedly, $500,000 in presumed general damages for injury to reputation and related mental anguish, distress and humiliation is warranted.[19]

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19. An examination of reported jury awards in defamation cases demonstrates that an award here of $500,000 in presumed damages is reasonable especially since El-Hadad has proven approximately $1 million in actual damages for wrongful termination and defamation. *Cf., e.g., O'Lee v. Compuware Corp.*,

(Cont'd)

Appendix B

CONCLUSION

The parties intended the LER, with its specific preconditions for terminating the employment contract,

(Cont'd)

2005 WL 2428694 (Cal.Super.) (reporting, in a wrongful termination and defamation case, an award of $500,000 presumed damages for each of two plaintiffs, in addition to actual damages proved in the amount of $100,000 for one plaintiff and $50,000 for the second plaintiff, as well as $3.45 million in punitive damages for each plaintiff); *Rice v. Grava*, 1997 WL 33349455 (Tex.Dist.) (reporting jury award of $1,250,000 presumed damages for slander per se and $105,000 for breach of employment contract); see also Frederick v. Fried, 2002 WL 31887353 (N.Y.Sup.) (reporting jury award of $500,000 in general, apparently presumed, damages for plaintiff in action for slander per se by former business partner injuring plaintiff, an attorney, in his profession); *Rouse v. Bicker*, 2002 WL 32158043 (Cal.Super.) (reporting $175,000 jury award in compensatory (actual and presumed) damages and $1 in punitive damages for slander per se for a co-owner of a taxi cab company who was forced to resign from board of directors but later reinstated when truth was revealed); *Schauer v. Thornton*, 2000 WL 33957519 (Wis.Cir.) (reporting jury award of $500,000 for presumed damages and $150,000 in punitive damages for slander per se by former employer of plaintiff, as well as another $500,000 in damages for invasion of privacy); (*Larsen v. Hapco Farms*, 2000 WL 3410951 (D.Idaho) (reporting $11.2 million presumed general damages jury award for Idaho potato grower who sued a business partner for libel when partner accused plaintiff of fabricating evidence that partner had mislabeled other potatoes as Idaho potatoes which resulted in the Idaho Potato Commission fining partner); *Roland v. Velur*, 1999 WL 619526 (Cal.Super.) (reporting $1,000,000 jury award for plaintiff for loss of reputation, loss of sales, general and presumed damages, after a business competitor slandered plaintiff to employees of plaintiff's sales force).

to apply to El-Hadad's employment at the embassy. The reasons offered by defendants to satisfy the preconditions for terminating El-Hadad under the LER were false and likely pretextual. Therefore, defendants breached the employment contract. El-Hadad attempted to mitigate his damages, but was unsuccessful. The UAE libeled El-Hadad, constituting defamation per se. The UAE also slandered El-Hadad concerning a matter that was incompatible with his profession, again constituting defamation per se. Accordingly, defendants are liable to El-Hadad for contract and tort damages in the amount of $1,745,961 plus prejudgment interest at the statutory rate on the contract damages due and owing El-Hadad from February 1, 1996 through the date of payment of the damages.

A final judgment accompanies this memorandum opinion.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED JULY 16, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 96-1943 (RWR)

MOHAMED SALEM EL-HADAD,

Plaintiff,

v.

EMBASSY OF THE UNITED ARAB EMIRATES, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff challenges the termination of his employment by defendants, the United Arab Emirates ("UAE") and its embassy in the District of Columbia. Defendants have moved to dismiss, asserting immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.* (West 2000). Because defendants have failed to satisfy their burden to show that the commercial activity exception to the FSIA does not apply, the Court has subject matter jurisdiction and the motion to dismiss is denied.

Appendix C

BACKGROUND

The factual background of this case was set forth fully in the prior decision of United States District Judge Stanley S. Harris in *El-Hadad v. Embassy of the United Arab Emirates*, 69 F. Supp. 2d 69, 71-72 (D.D.C. 1999), and in the decision of the United States Court of Appeals for the District of Columbia Circuit in *El-Hadad v. United Arab Emirates*, 216 F.3d 29, 31, 32 (D.C. Cir. 2000). Briefly, plaintiff is an Egyptian citizen who was employed as an auditor in the Cultural Division of the UAE's embassy in the District of Columbia from January 1993 to February 1996. When plaintiff was discharged based on allegations of financial improprieties, plaintiff filed this lawsuit alleging breach of contract and defamation.

Defendants UAE and its embassy moved to dismiss based on their assertion of foreign immunity.[1] Judge Harris denied defendants' motion and defendants appealed from that decision.[2] The District of Columbia Circuit determined that there were "factual questions that must be resolved before the relationship between

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1. Three individual defendants also moved to dismiss for lack of personal jurisdiction. Their motion was granted and they have been dismissed as defendants in this case.

2. "The denial of a foreign state's motion to dismiss on the ground of sovereign immunity is subject to interlocutory appeal under the collateral source doctrine." *El-Hadad*, 216 F.3d at 31 (citing *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847 (D.C. Cir. 2000)).

El-Hadad and the U.A.E. can be characterized as commercial rather than governmental" and remanded the case to the district court. *El-Hadad*, 216 F.3d at 31. Following remand, the parties submitted additional briefing and evidence to support their respective arguments on the immunity issue.

DISCUSSION

"The FSIA provides the sole avenue by which American courts can obtain jurisdiction over foreign states." *Id.* (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992)). "Under the FSIA, a foreign state is immune from the jurisdiction of our courts unless certain statutory exceptions are met." *Id.; see also Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1171 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995). Plaintiff bears the initial burden under the FSIA to show that an exception applies. *Cargill International S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993). The foreign state has the ultimate burden of persuasion, however, to show that the exception does not apply. *Princz*, 26 F.3d at 1171.

In this case, the exception at issue is the commercial activity exception, which provides that a foreign state does not have immunity from federal court jurisdiction in the United States in cases "in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . ." *See* 28 U.S.C. § 1605(a)(2); *El-Hadad*, 216 F.3d at 31. "Commercial activity" is defined in the FSIA as "either a regular

course of commercial conduct or a particular commercial transaction or act." *Princz*, 26 F.3d at 1171 (quoting 28 U.S.C. § 1603(d)). The "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* at 1171-72. "Congress expressly concluded that it was unwise to attempt an excessively precise definition of 'commercial activity,' and chose instead to give the courts a great deal of latitude in determining what is a 'commercial activity' for purposes of the FSIA, providing only a few (sometimes conflicting) examples of the kinds of employment it regarded as falling within that category." *El-Hadad*, 216 F.3d at 34 (internal quotations omitted).

The District of Columbia Circuit defined the ultimate question in this case to be "whether El-Hadad's employment constituted commercial activity" and identified "the operative question [to be] whether El-Hadad was a member of the U.A.E.'s civil service." *Id.* The circuit court suggested a non-exclusive list of questions that it considered relevant for the district court to consider in answering those questions in this case.

The first question is "how do the U.A.E.'s own laws define its civil service, and do El-Hadad's job title and duties come within that definition?" *Id.* The undisputed evidence in the record establishes that the UAE does not distinguish between employees paid by the government by categorizing them as civil service employees, governmental employees, or civilian employees. *See* Federal Law No. (8) 1973 of Civil Service

in the Federal Government, Exh. 1 to Defendants' Brief Pursuant to the June 16, 2000 Remand Order; Declaration of Fathalla Al-Meswari, attached to Defendants' brief, ¶ 11.[3] Indeed, there is no evidence in the record that the UAE has defined the term "civil service." Thus, plaintiff's job title and responsibilities cannot be classified reliably as falling within or without any UAE classification or definition of its civil service since no such designations appear to exist.

The second question is "what was the nature of El-Hadad's employment relationship with the U.A.E.? Did he have a true contractual arrangement, or is his 'contract' claim instead based, as the U.A.E. contends, solely upon the civil service laws of the U.A.E.?" *El-Hadad*, 216 F.3d at 34. Plaintiff claims that he had a contract to work as an auditor for the UAE at its embassy. Plaintiff has presented evidence that the Cultural Attache for the UAE's embassy wrote in December 1994 that plaintiff's position as Accounting Auditor did not "have the Civil servant benefits." *See* Letter from Mohammed A. Al-Nayadi, attached to plaintiff's reply. Plaintiff states in his declaration, attached to his brief, that he did not receive a number of the benefits which are provided to UAE foreign service employees. *See* Declaration of Mohamed Salem El-Hadad ("El-Hadad Declaration"), ¶¶ 17-21.

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3. In defendants' Exhibit 1, the title of the UAE law is translated to include the term "Civil Service," but in defendants' Exhibit 5, the title of the law is translated to use the term "Public Service."

Appendix C

Although defendants have argued that plaintiff was a civil service employee, they state in their brief that plaintiff "had a contractual relationship with the Government of the United Arab Emirates . . . ." *See* Defendants' Brief, at 10. It appears from the evidence in this case that El-Hadad had a contractual arrangement with the UAE that did not include "Civil servant benefits."

The third question is "what was the nature of El-Hadad's employment relationship when he worked in the U.A.E., and how did his subsequent employment at the Embassy relate to that prior tenure?" *El-Hadad*, 216 F.3d at 34. Plaintiff states in his declaration, attached to his brief, that he retired from his job in the UAE in 1992 and was paid severance benefits consistent with the auditor position he held in that country. *See* El-Hadad Declaration, ¶¶ 6-7. Plaintiff states in his declaration that he then entered the United States on a tourist visa. *Id.*, ¶ 9. While here, plaintiff was contacted by representatives of the UAE's embassy and offered the auditor position at the Cultural Division. *Id.*, ¶¶ 10-11.

Defendants contend that El-Hadad merely transferred to Washington to perform the same functions he had been performing in the UAE. Defendants, however, have presented no evidence to support this contention or to contradict evidence presented by plaintiff in his declaration. The evidence in the record suggests that El-Hadad's employment at the UAE's embassy in the District of Columbia was separate from and unrelated to his prior employment in the UAE.

Appendix C

The fourth question suggested by the circuit court is "what was the nature of El-Hadad's work?" *El-Hadad*, 216 F.3d at 34. The employment of certain workers, such as "laborers, clerical staff or public relations or marketing agents" falls within the commercial activity exception to the FSIA. *See id.* (citing H.R. REP. NO. 94-1487, at 16, U.S. Code Cong. & Admin. News 1976, at 6615). Plaintiff's evidence indicates that he was a contract employee hired by the UAE to perform an audit of the Cultural Division of its Washington, D.C. embassy. *See* El-Hadad Declaration, ¶ 11. According to plaintiff, his work "included general accounting duties, like daily and monthly accounting, preparing checks for payment of invoices, [and] preparing financial reports." *Id.*, ¶ 13. Plaintiff has presented uncontroverted evidence that he had no role in the creation of UAE government policy and was not privy to UAE political deliberations. *Id.*, ¶¶ 14-15. This can suggest that the nature of plaintiff's work was not similar to that of a civil service employee. *See, e.g., Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987) (employee who "had no role in the creation of the government policy" and was not "privy to its political deliberations" was not considered a part of the Spanish government for purposes of foreign immunity). *Segni* also observed that activity in which a private person or individual business could engage would tend to be commercial rather than governmental for purposes of the FSIA. Since auditors *are* routinely hired by private businesses, this, too, may suggest that plaintiff's work at the UAE's embassy was more commercial than governmental.

Appendix C

The circuit court's final question is "what is the relevance of El-Hadad's Egyptian nationality on the facts of this case?" *El-Hadad*, 216 F.3d at 34. In connection with this question, the appellate court asked whether the UAE is a country in which non-nationals are unlikely to be employed as governmental officers, or whether the UAE routinely employs non-nationals in governmental positions. *Id.* Although there is undisputed evidence in the record that a high percentage of UAE residents are not citizens of that country, neither party has presented evidence regarding whether the UAE routinely employs non-nationals in positions which, in this country, would be considered civil service. Plaintiff argues that his status as a citizen of Egypt, rather than of the UAE, is relevant because it supports his position that he was hired as a contract employee because he was someone outside the UAE Embassy's Cultural Division and could perform the audit responsibilities on a more independent basis. Plaintiff has not, however, presented evidence to support this argument.

When the parties' evidence and arguments regarding the five factors suggested by the District of Columbia Circuit are viewed in light of defendants' burden of persuasion, defendants have not shown that El-Hadad was a member of UAE's civil service. Defendants have not shown that the UAE classifies its government employees as either civil service or non-civil service, have not presented evidence which contradicts plaintiff's affidavit regarding his duties or his benefits, and concede in their brief that plaintiff had a contractual relationship with the UAE. Defendants have also failed

to present evidence of other factors tending to show plaintiff's civil service status or that his work did not constitute commercial activity. Consequently, defendants have not satisfied their burden to prove that El-Hadad's employment at the UAE's embassy was not commercial activity and that the commercial activity exception to the FSIA does not apply. Because defendants have failed to prove that the exception does not apply, the Court has jurisdiction over plaintiff's breach of contract and defamation claims against the UAE and its embassy in the District of Columbia.[4]

CONCLUSION

Defendant has failed to establish that plaintiff was employed as a civil servant and that his employment did not fall within the commercial activity exception to the FSIA. As a result, this Court has jurisdiction over plaintiff's complaint, and it is hereby

ORDERED that defendants' Motion to Dismiss [14] be, and hereby is, **DENIED.**

SIGNED this 16th day of July, 2001.

s/ Richard W. Roberts
RICHARD W. ROBERTS
United States District Judge

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4. The District of Columbia Circuit agreed with Judge Harris's ruling that "if El-Hadad's action is based upon commercial activity, the U.A.E. is not immune from his claim for defamation." *El-Hadad*, 216 F. 3d at 31.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED JUNE 16, 2000

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 99-7220.

Mohamed Salem EL-HADAD,

Appellee,

v.

UNITED ARAB EMIRATES and
The Embassy of the United Arab Emirates,

Appellants.

Argued May 19, 2000.
Decided June 16, 2000.

Before: GINSBURG, TATEL, and GARLAND, Circuit Judges.

Opinion of the court filed by Circuit Judge GARLAND.

GARLAND, Circuit Judge:

Plaintiff Mohamed Salem El-Hadad is a citizen of Egypt and a former employee of the Embassy of the United Arab Emirates located in Washington, D.C. After

his employment was terminated, El-Hadad sued both the Embassy and the United Arab Emirates (collectively, "the U.A.E.") for alleged breach of contract and defamation.[1] The U.A.E. moved to dismiss, asserting immunity from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602 *et seq.* The district court denied the U.A.E.'s motion on the pleadings, holding that the employment relationship between the U.A.E. and El-Hadad came within the "commercial activity" exception to sovereign immunity because El-Hadad was not a national of the U.A.E. The court also rejected the U.A.E.'s contention that even if plaintiff's suit fell within the "commercial activity" exception, the FSIA contains an "exception to that exception" for defamation claims.

The U.A.E. appeals from the denial of its motion to dismiss. We conclude that there are factual questions that must be resolved before the relationship between El-Hadad and the U.A.E. can be characterized as commercial rather than governmental, and we therefore reverse in part and remand for further proceedings. We agree with the district court, however, that if El-Hadad's action is based upon commercial activity, the U.A.E. is not immune from his claim for defamation.

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1. The complaint also named three individuals acting in their official capacities. The district court granted the individuals' motion to dismiss for lack of personal jurisdiction, *see El-Hadad v. Embassy of U.A.E.*, 69 F.Supp.2d 69, 76-79 (D.D.C.1999), and that decision is not at issue in this appeal.

Appendix D

I

The denial of a foreign state's motion to dismiss on the ground of sovereign immunity is subject to interlocutory appeal under the collateral order doctrine. *See Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847 (D.C.Cir.2000). Because the district court decided the motion on the pleadings, our standard of review is de novo. *See id.*

The FSIA provides the sole avenue by which American courts can obtain jurisdiction over foreign states. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). Under the FSIA, a foreign state is immune from the jurisdiction of our courts unless certain statutory exceptions are met. *See* 28 U.S.C. §§ 1604-1605. The principal exception at issue here is that for "commercial activity." The Act provides that a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case— . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state. . . ." *Id.* § 1605(a).

Our precedent makes clear that the employment of personnel by a foreign state is not per se commercial activity under the FSIA.[2] In *Broadbent v. Organization*

2. The FSIA provides that: "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). As the Supreme (Cont'd)

of American States, applying an analysis based on the FSIA, we held that the firing of staff members of the General Secretariat of the Organization of American States (OAS) was not commercial activity and therefore that the OAS was immune from suit for improper discharge. *See* 628 F.2d 27, 35 (D.C.Cir.1980). In support, we cited the House Report on the FSIA, which states in part: "Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel. . . ." H.R.Rep. No. 94-1487, at 16 (1976), U.S.Code Cong. & Admin.News 1976, 6604, at 6615.[3] The words replaced by the ellipses in this quotation will soon become important, but for now it is enough to note that, as we concluded in *Broadbent,* the "report clearly marks employment of civil servants as noncommercial for purposes of restrictive immunity." 628 F.2d at 34.[4]

(Cont'd)

Court recognized in *Weltover,* however, this definition "leaves the critical term 'commercial' largely undefined." 504 U.S. at 612, 112 S.Ct. 2160. The sentence "merely specifies what element of the conduct determines commerciality (i.e., nature rather than purpose), but still without saying what 'commercial' means." *Id.* The Court concluded that the defining "issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce." *Id.* at 614, 112 S.Ct. 2160 (internal quotation marks and citation omitted).

3. The Senate Report contains the same language, both on this point and on the others quoted below. *See* S.Rep. No. 94-1310, at 16 (1976); *see also id.* at 20-21.

4. That point distinguishes *Broadbent* from *Janini v. Kuwait University,* 43 F.3d 1534 (D.C.Cir.1995), in which we held

(Cont'd)

Appendix D

The U.A.E. contends that El-Hadad was a civil servant of the U.A.E., and that his firing is therefore noncommercial and immune from suit in our courts. Although El-Hadad is an Egyptian citizen, it is uncontested that he worked for the government of the U.A.E. for sixteen years.[5] For the first thirteen of those years, he worked in the U.A.E. as an auditor. Beginning in January of 1993, El-Hadad worked as an auditor in the Cultural Division of the U.A.E.'s Embassy in Washington. The U.A.E. terminated El-Hadad's employment in February 1996. El-Hadad alleges that he was terminated after he uncovered misappropriation of U.A.E. public funds. The U.A.E. disputes this allegation, but contends that even if it were true, the auditing function El-Hadad performed is the work of a civil servant and the U.A.E. is therefore immune from suits arising from such activity.

The district court held that regardless whether El-Hadad was a member of the U.A.E.'s civil service, his

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(Cont'd)
that the firing of teachers at Kuwait University came within the commercial activity exception. There was no claim in that case that the teachers were civil servants of the government of Kuwait.

5. The district court decided the motion to dismiss on the pleadings, and we therefore assume that this and the following facts, taken from ¶ 9 of the complaint, are true. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 351, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). In any event, except where noted, the U.A.E. does not contest their validity.

employment would nonetheless constitute commercial activity because he is not a U.A.E. national. The court based that conclusion on language in our *Broadbent* opinion, which stated that there is "an exception from the general rule" that civil service employment is noncommercial "in the case of employment of American citizens or third country nationals by foreign states." *Broadbent*, 628 F.2d at 34. The district court did note, however, that other circuits have not invoked such an exception. Instead, those courts examine the specifics of the employment relationship for indicia of civil service, treating the employee's nationality-if they consider it at all-as a non-dispositive factor. *See Holden v. Canadian Consulate*, 92 F.3d 918, 920-22 (9th Cir.1996) (examining details of American's employment with Canadian Consulate to determine whether Consulate was immune on ground that plaintiff was member of civil service); *Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 & n. 7 (7th Cir.1987) (noting that nationality can be a factor, but deciding the case by reference to specifics of employment relationship rather than fact of third country nationality).

We cannot fault the district court for its legal conclusion, resting, as it did, on the language of *Broadbent*. But that language was plainly dictum, not necessary to decide the case and therefore not binding upon us. *See, e.g., United States v. Torres*, 115 F.3d 1033, 1036 (D.C.Cir.1997). While *Broadbent* did opine that third country nationality would be dispositive in a case involving a sovereign state, *Broadbent* itself involved an international organization. Notwithstanding that some

of the plaintiffs were Americans, the court declined to apply a "third country nationality" exception to the civil service rule in that case, reasoning that since an international organization has no nationals of its own, applying such an exception in the context of international organizations would "swallow up the rule of immunity for civil service employment disputes." *Broadbent,* 628 F.2d at 34.

Now that we are squarely faced with the question, we conclude that a per se rule of non-immunity for a foreign state's employment of third country nationals is inconsistent with Congress' intent to immunize foreign governmental activity from suit in American courts. Indeed, when pressed at oral argument, both sides appeared to agree. Both concurred, for example, that if El-Hadad had been the U.A.E.'s ambassador to the United States, the U.A.E. would have immunity for firing him despite his Egyptian nationality. Nor, apparently, is this scenario particularly far-fetched. Both parties agreed that small countries such as the U.A.E. do, at times, employ nationals of other countries (and particularly citizens of regional neighbors) in high governmental positions.[6]

We now return to the ellipses noted above. The full quotation from the House Report is as follows:

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6. An estimated 75% of the U.A.E.'s population between the ages of 15 and 64 consists of non-nationals. *See* CIA, The World Fact Book 1999, at 504 (available at <http://www.odci.gov/cia/publications/factbook/tc.html>).

"Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States." H.R.Rep. No. 94-1487, at 16, U.S.Code Cong. & Admin.News 1976, at 6615. *Broadbent* read the language beginning with "but not" (for which we substituted the ellipses above) as creating a per se exception from the general rule that civil service employment is governmental rather than commercial. *See Broadbent*, 628 F.2d at 34. That is surely a reasonable interpretation. But we think it at least as likely that Congress was attempting to contrast civil service (and diplomatic and military employment, not at issue here) with non-civil service employment, operating on the assumption that it was unlikely a country would employ an American or third country national in such a position. This view of the legislative history is bolstered by the next paragraph of the House Report, which lists, as additional examples of commercial activity, a foreign government's "employment or engagement of laborers, clerical staff or public relations or marketing agents," H.R.Rep. No. 94-1487, at 16, U.S. Code Cong. & Admin. News 1976, at 6615—job categories which Congress apparently also thought unlikely to be occupied by members of a government's civil service.

In any event, the language that must control our decision is that of the statute rather than of the somewhat muddy legislative history. Under the FSIA, the immunity exception depends solely on whether the action is based upon a "commercial activity," without any

mention of the nationality of the participants. *See* 28 U.S.C. § 1605(a)(2). We have no warrant, therefore, for formulating a test that turns solely on nationality. To the contrary, because under the usual understanding of the terms a foreign state can engage in noncommercial (i.e., governmental) activity through third country nationals, the statutory language dictates that the inquiry cannot end with the fact that the employee is not a citizen of the employing state. At oral argument, both parties agreed.

II

Because defendants' motion was dismissed on the pleadings, we remand the case to the district court to undertake a further inquiry. The ultimate question to be answered is whether El-Hadad's employment constituted commercial activity. As we held in *Broadbent*, the employment of civil servants is noncommercial for purposes of the FSIA. *See Broadbent*, 628 F.2d at 34-36. Hence, the operative question is whether El-Hadad was a member of the U.A.E.'s civil service. In order to guide the proceedings on remand, we suggest some questions that appear relevant to making that determination in this case. We do not regard them as an exclusive list, nor as necessarily applicable in all cases.

First, how do the U.A.E.'s own laws define its civil service, and do El-Hadad's job title and duties come within that definition?

Second, what was the nature of El-Hadad's employment relationship with the U.A.E.? Did he have a true contractual arrangement, or is his "contract" claim instead based, as the U.A.E. contends, solely upon the civil service laws of the U.A.E.?

Third, what was the nature of El-Hadad's employment relationship when he worked in the U.A.E., and how did his subsequent employment at the Embassy relate to that prior tenure? The U.A.E. contends that El-Hadad was a long-time resident and member of its domestic civil service, who was merely "transferred" to Washington to perform the same functions (governmental audits) he had been performing at home. El-Hadad contends, on the other hand, that he quit his position in the U.A.E. and began a "new" job in the United States, "separate from his previous employment."

Fourth, what was the nature of El-Hadad's work? As noted above, Congress indicated that the "employment or engagement of laborers, clerical staff or public relations or marketing agents" would come within the definition of commercial activity. H.R.Rep. No. 94-1487, at 16, U.S.Code Cong. & Admin.News 1976, at 6615.

Fifth, what is the relevance of El-Hadad's Egyptian nationality on the facts of this case? Is the U.A.E. a country in which, as the House Report assumed, non-nationals are unlikely to be employed as governmental officers? Or does the U.A.E. often employ non-nationals in governmental positions?

We appreciate that this multi-factor inquiry is not analytically precise. That is a consequence of Congressional preferences, however, rather than our own. Congress expressly concluded that it was "unwise to attempt an excessively precise definition" of "commercial activity," and chose instead to give the "courts . . . a great deal of latitude in determining what is a 'commercial activity' for purposes of" the FSIA, providing only a few (sometimes conflicting) examples of the kinds of employment it regarded as falling within that category. *Id.* at 16, U.S. Code Cong. & Admin. News 1976, at 6615. Although the Supreme Court has repeatedly lamented this situation, *see Saudi Arabia v. Nelson*, 507 U.S. 349, 359, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) (noting that the FSIA "leaves the critical term 'commercial' largely undefined") (quoting *Weltover*, 504 U.S. at 612, 112 S.Ct. 2160), it has also noted that courts "do not have the option to throw up [their] hands" and must instead accept "judicial responsibility to determine what a 'commercial activity' is for purposes of the Act." *Id.*

III

The U.A.E. contends that even if its termination of El-Hadad were regarded as coming within the "commercial activity" exception to sovereign immunity, plaintiff's claim that he was defamed in connection with that termination would nonetheless have to be dismissed under a "defamation" exception to that exception. As the district court correctly held, however, defamation is not an "exception to the exception" for commercial activity,

but rather an exception to a separate FSIA exception for noncommercial torts.

The FSIA provides that a "foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case" in which one of several exceptions applies. 28 U.S.C. § 1605(a). The second exception, contained in paragraph (2) of § 1605(a), is the one considered above: any case "in which the action is based upon commercial activity carried on in the United States by the foreign state." *Id.* § 1605(a)(2). Paragraph (2) does not contain a defamation exception to its commercial activity exception. There is, therefore, no indication that defamation arising out of a commercial activity is immune from suit.

It is the fifth exception to immunity, contained in paragraph (5) of § 1605(a), that is implicated by the U.A.E.'s argument here. That paragraph applies to any case "not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for . . . damage to or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state." *Id.* § 1605(a)(5). Unlike the exception for commercial activity, this tort exception does contain an exception for, inter alia, defamation: "[T]his paragraph," the FSIA states, "shall not apply to . . . any claim arising out of . . . libel, [or] slander. . . ." *Id.* § 1605(a)(5), (a)(5)(B).

The U.A.E. contends that the defamation exception to paragraph (5) is applicable not only to the torts

covered by that paragraph, but also to the commercial activity covered by paragraph (2). That reading, however, is expressly contradicted by the language of the statute. As just quoted, paragraph (5) begins by stating that it applies only to cases "not otherwise encompassed in paragraph (2) above," i.e., only to those tort cases not encompassed by the commercial activity paragraph. And in subsequently introducing its own exceptions, paragraph (5) goes on to state that " *this* paragraph"—i.e., paragraph (5)-"shall not apply to" libel or slander. *Id.* § 1605(a)(5), (a)(5)(B) (emphasis added). The language therefore makes clear that paragraph (5) and its defamation exception are inapplicable to tort cases based upon commercial activity.

This reading is confirmed by the legislative history, which repeatedly refers to the category encompassed by paragraph (5) as " *non*commercial torts." H.R.Rep. No. 94-1487, at 20, 21 (emphasis added); *see Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) (referring to § 1605(a)(5) as the "noncommercial torts exception"); *cf. Nelson*, 507 U.S. at 361-62, 113 S.Ct. 1471 (finding that the tortious activity alleged in that case, wrongful arrest by Saudi police, failed to qualify as commercial activity because it was "not the sort of action by which private parties can engage in commerce"). Paragraph (5), the House Report states, "is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages, *not otherwise encompassed by section 1605(a)(2) relating to commercial activities*." H.R.Rep. No. 94-

1487, at 20-21, U.S.Code Cong. & Admin.News 1976, at 6619 (emphasis added). Its "purpose," the Report continues, "is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against the foreign state to the extent otherwise provided by law." *Id.* at 21, U.S. Code Cong. & Admin. News 1976, at 6620.

This reading is also consistent with the case law. This circuit has previously stated that the exceptions to paragraph (5) do not limit the commercial activity exception. *See Gilson v. Republic of Ireland,* 682 F.2d 1022, 1028 n. 27 (D.C.Cir.1982) (stating that 28 U.S.C. § 1605(a)(5)(B) "does *not* limit *id.* § 1605(a)(2)"). Those of our sister circuits that have considered the question have reached the same conclusion. *See Southway v. Central Bank of Nigeria,* 198 F.3d 1210, 1219 (10th Cir.1999); *Export Group v. Reef Industries, Inc.,* 54 F.3d 1466, 1473-77 (9th Cir.1995); *see also Letelier v. Republic of Chile,* 748 F.2d 790, 795 (2d Cir.1984) (noting that the statutory language "suggests that the commercial activity exception to jurisdictional immunity under paragraph (2) and the tort exception under (5) are mutually exclusive"). Accordingly, we affirm the district court's decision that activity encompassed by the waiver of sovereign immunity contained in 28 U.S.C. § 1605(a)(2) does not become subject to suit by virtue of the provisions of § 1605(a)(5)(B).[7]

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7. We reject the U.A.E.'s argument that foreign sovereigns should be immune from actions for defamation under the FSIA because the United States is immune from such actions under (Cont'd)

IV

The decision of the district court is reversed in part and the case is remanded for further proceedings consistent with this opinion.

(Cont'd)
the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(h). Although both statutes contain defamation exceptions, *see* H.R. Rep. No. 94-1487, at 21, the analogy becomes inapposite when applied in the context of the FSIA's commercial activity exception because there is no comparable immunity exception under the FTCA. *See Export Group*, 54 F.3d at 1476 (describing FSIA's commercial activity exception as "ha[ving] no counterpart in the FTCA").

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AUGUST 30, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. CIV. A. 96-1943 SSH.

Aug. 30, 1999

Mohamed Salem EL-HADAD,

Plaintiff,

v.

EMBASSY OF THE
UNITED ARAB EMIRATES, et al.,

Defendants.

OPINION

STANLEY S. HARRIS, District Judge.

Plaintiff brings this breach of contract and defamation action against the United Arab Emirates ("U.A.E."), the Embassy of the United Arab Emirates ("the Embassy"), and three individuals acting in their official capacities on behalf of the U.A.E.-Saif Rashid Al-Suwaidi ("Al-Suwaidi"), Magid Al-Khazragi ("Al-Khazragi"), and Nahyan bin Mubark Al-Nahyan

("Al-Nahyan"). Before the Court are defendants' motion to dismiss the amended complaint and related pleadings.[1] The Court treats this motion to dismiss as being made on behalf of all five defendants.[2] Upon consideration of

1. A motion to dismiss the original complaint also was filed. The Court considers only the motion to dismiss the amended complaint, because the previous motion to dismiss was mooted when plaintiff filed an amended complaint. "An amended complaint supersedes the original complaint and renders it of no legal effect unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading." *King v. Dogan*, 31 F.3d 344, 346 (5th Cir.1994). Because plaintiff's amended complaint did not refer to and adopt the original complaint, it superseded the original complaint. It follows that a motion to dismiss a superseded complaint has no legal effect.

2. The motion to dismiss the original complaint was filed on behalf of three of the four original defendants. The motion to dismiss the amended complaint was submitted by all five defendants ultimately named. In plaintiff's opposition to the motion to dismiss the amended complaint, however, he notes that the parties entered into a stipulation on April 7, 1997, setting the time for only defendants Al-Nahyan and Al-Khazragi, the two defendants who did not join the first motion to dismiss, to respond to the complaint. Thus, plaintiff's opposition addresses only their arguments and requests that the Court strike the remaining three defendants from the motion to dismiss the amended complaint. If the Court does not, plaintiff requests an additional opportunity to brief the motion to dismiss the amended complaint as to those three defendants.

Defendants contend that plaintiff's amended complaint nullified any previously filed pleadings, and thus, the first motion

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the sufficiency of the complaint, the Court grants defendants' motion to dismiss for lack of personal jurisdiction as to Al-Suwaidi, Al-Khazragi, and Al-Nahyan, but denies the remainder of the motion. "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56." Fed.R.Civ.P. 52(a); *Summers v. Department of Justice,* 140 F.3d 1077, 1079-80 (D.C.Cir.1998). Nonetheless, the Court sets forth its reasoning.

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to dismiss and related pleadings are moot. Defendants also argue that, because plaintiff has addressed the motion to dismiss the amended complaint as to only two defendants, plaintiff has conceded the arguments of the remaining three defendants. The Court declines to strike the three defendants from the second motion to dismiss. Simply because the parties stipulated to allow two defendants additional time to file dispositive motions does not bar the remaining defendants, who have a right to respond to the amended complaint, from filing a timely motion to dismiss. While the remaining defendants may have responded to the amended complaint beyond their allotted time under Fed.R.Civ.P. 12(a)(1)(B), plaintiff did not raise this argument, and the Court will allow their out-of-time filing.

The Court will not, however, afford plaintiff a further opportunity to brief the motion to dismiss the amended complaint as to the three defendants. The Court provides its reasoning further in this Opinion on pages 13-14. With the exception of the motion to dismiss for lack of personal jurisdiction, plaintiff will not be prejudiced by the lack of opportunity for further briefing since the Court denies most of defendants' motion to dismiss. The Court will not consider plaintiff's lack of opposition to be concessions to defendants' arguments, but rather, the Court simply will assess the motion to dismiss without the benefit of plaintiff's opposition.

Appendix E

Background

Plaintiff is an Egyptian citizen and a domiciliary of Virginia. For thirteen years, he was employed as an auditor of accounts in the U.A.E. From January 1993 to February 1996, plaintiff was employed as an auditor in the Cultural Division of the Embassy in Washington, D.C. He claims that he was dismissed from his position without apparent cause or notice, and that his discharge was influenced by his discovery of damaging information about some of his superiors at the Embassy. In June 1996, the Embassy rehired plaintiff in the military attache's office. Plaintiff claims that this employment was on an *ad hoc* basis and was intended to dissuade him from seeking a legal remedy for his previous dismissal. Plaintiff claims that he was summarily dismissed in August 1996, when he refused to discontinue his efforts to file a lawsuit. On August 22, 1996, plaintiff filed his original complaint against the U.A.E., the Embassy, Al-Suwaidi as Director of Financial and Administrative Affairs, and Al-Khazragi as Director of the State Audit Institution, alleging breach of contract and defamation. In October 1996, plaintiff amended his complaint to add Al-Nahyan, Minister of Higher Education and Scientific Research; furthermore, plaintiff alleged that defendants attempted to compel him to withdraw his original complaint, and when he refused, plaintiff's wife was dismissed from her position at the Embassy. Defendants U.A.E., the Embassy, and Al-Suwaidi, through their attorney, stipulated to service of the original complaint on October 10, 1996. On February 19, 1997, defendants Al-Khazragi and Al-Nahyan also stipulated to service through counsel.

Appendix E

After the amended complaint was filed, but before defendants Al-Khazragi and Al-Nahyan stipulated to service, the U.A.E., its Embassy, and defendant Al-Suwaidi filed a motion to dismiss to the original complaint. An opposition and a reply followed. Thereafter, all five defendants filed a motion to dismiss the amended complaint, seeking essentially the same relief as requested in the previously filed motion.

Analysis

Defendants assert six bases for dismissing some or all of plaintiff's claims: (1) lack of subject matter jurisdiction as to all the claims under the Foreign Sovereign Immunities Act ("FSIA"); (2) lack of personal jurisdiction over all the defendants; (3) lack of subject matter jurisdiction as to plaintiff's defamation claim under the FSIA; (4) preclusion of judicial review under the Act of State doctrine; (5) lack of jurisdiction because the acts occurred within a foreign mission; and (6) immunity for defendants Al-Suwaidi, Al-Khazragi, and Al-Nahyan under the doctrine of Head of State immunity. The Court finds no merit in defendants' six defenses, except the lack of personal jurisdiction as to the three individual defendants.[3]

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3. The Court briefly considers plaintiff's argument that the motion to dismiss should be denied because defendants rely on facts outside the record. Plaintiff argues that if the Court were to convert this motion pursuant to Fed.R.Civ.P. 12(c) to a summary judgment motion because extrinsic facts are presented, defendants do not provide the proper supporting materials as

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Appendix E

Subject Matter Jurisdiction

The FSIA, codified at 28 U.S.C. §§ 1330, 1391, 1441, 1602-1611 (1994), is the "sole basis for obtaining jurisdiction over a foreign state in our courts," *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). It therefore must be applied in every action involving a foreign state defendant. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). Under the FSIA, a foreign state is immune from the jurisdiction of U.S. courts unless the challenged conduct

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required by Fed.R.Civ.P. 56(e), and thus, the motion should be denied as procedurally defective. Alternatively, plaintiff urges the Court to disregard the extrinsic facts.

First, when considering a Rule 12(b)(1) motion for lack of subject matter jurisdiction, the conversion feature of Rule 12 does not apply, and the Court "may make 'appropriate inquiry' beyond the pleadings to 'satisfy itself on authority to entertain the case.' " *Haase v. Sessions*, 835 F.2d 902, 906 (D.C.Cir.1987) (quoting *Gordon v. National Youth Work Alliance*, 675 F.2d 356, 362-63 (D.C.Cir.1982)). Nevertheless, the Court determines that it may decide the Rule 12(b)(1) motion, as well as the remainder of the motion to dismiss, without reference to the extrinsic facts. "Under Rule 12(b), Fed.R.Civ.P., the Court has discretion not to accept matters outside the pleadings presented by any party in conjunction with a Rule 12(b)(6) motion, particularly where the proffered material and the conversion from a motion to dismiss to one for summary judgment will not facilitate the disposition of the action." *Thomas v. District of Columbia*, 887 F.Supp. 1, 5 n. 1 (D.D.C.1995). The Court therefore considers this motion as a motion to dismiss without regard to extrinsic facts.

falls within certain limited statutory exceptions, as set forth in 28 U.S.C. § 1604. *Argentine Republic,* 488 U.S. at 434, 109 S.Ct. 683. The scope of sovereign immunity for a foreign state extends to any political subdivisions, instrumentalities, and agencies of that state, *McKesson Corp. v. Islamic Republic of Iran,* 52 F.3d 346, 351 (D.C.Cir.1995); individuals committing acts within their official capacities are considered agencies or instrumentalities of a foreign state. *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan,* 115 F.3d 1020, 1027 (D.C.Cir.1997); *El-Fadl v. Central Bank of Jordan,* 75 F.3d 668, 671 (D.C.Cir.1996); *see Underwood v. The United Republic of Tanzania,* 1995 WL 46383, at *2 (D.D.C. Jan.27, 1995) (an embassy of a sovereign nation is a foreign state); *TIFA, Ltd. v. Republic of Ghana,* 1991 WL 179098, at *7 (D.D.C. Aug.27, 1991) (embassy of Ghana is an instrumentality of Ghana).

The Court concludes, and defendants do not dispute, that all five defendants fall within the definition of "a foreign state" for purposes of the FSIA, and that the FSIA therefore applies to this action as to all five defendants. The Court thus must determine whether subject matter jurisdiction exists under the FSIA.

A. *"Commercial activity" exception*

Under the FSIA, the plaintiff first must produce evidence that shows an exception to the FSIA applies; the foreign state then has the ultimate burden of persuasion that the exception does not apply. *Princz v. Federal Republic of Germany,* 26 F.3d 1166, 1171

(D.C.Cir.1994). The activity upon which this action is based is the U.A.E.'s employment and termination of plaintiff. Plaintiff contends that defendants' conduct with respect to his employment falls within the "commercial activity" exception of the FSIA, codified at 28 U.S.C. § 1605(a)(2). That section provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

The Court must therefore determine whether defendants' actions with respect to plaintiff's employment are considered commercial activity.

Congress has stated that the commercial character of the activity is determined by examining the nature, rather than the purpose, of the activity. 28 U.S.C. § 1603(d). But Congress "deliberately left the meaning

open and . . . 'put [its] faith in the U.S. courts to work out progressively, on a case-by-case basis . . . the distinction between commercial and governmental.' " *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1549 (D.C.Cir.1987) (quoting *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308-9 (2d Cir.1981)). The courts have concluded that "a foreign sovereign engages in commercial activity when it engages in those activities that 'can also be exercised by private citizens,' as distinct from those 'peculiar to sovereigns.' " *Sealift Bulkers v. Republic of Armenia*, 965 F.Supp. 81, 84 (D.D.C.1997) (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 360, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993)); *see Janini v. Kuwait Univ.*, 43 F.3d 1534, 1537 (D.C.Cir.1995).

A foreign state's employment of individuals can be characterized as either governmental or commercial activity depending on whether the employment relationship is "peculiar to sovereigns." The existing caselaw and legislative history therefore have categorized employment relationships as such: "employment of diplomatic, civil service or military personnel is governmental and the employment of other personnel is commercial." *Holden v. Canadian Consulate*, 92 F.3d 918, 921 (9th Cir.1996); *see also* H.R.Rep. No. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615 ("Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel .... Activities such as a foreign government's ... employment or engagement of laborers, clerical staff or

marketing agents . . . would be among those included within the definition [of commercial activity]").

Given this categorization of employment relationships, defendants argue that termination of plaintiff's employment was a governmental function because plaintiff was a civil servant. Defendants focus on *Holden v. Canadian Consulate,* in which the Ninth Circuit noted that "[b]ecause private parties cannot hire . . . civil service . . . personnel, such hiring is necessarily governmental." 92 F.3d at 921. Defendants rely on *Holden*'s discussion of various factors for determining who is considered a civil servant, as well as U.A.E. law and regulations which purportedly categorize plaintiff as a civil servant.

Defendants' argument, however, is inconsistent with the decisive factor in this case, as well as a D.C. Circuit case, *Broadbent v. Organization of American States,* 628 F.2d 27 (D.C.Cir.1980), and a key statement in House Report No. 94-1487, that lead the Court to conclude that defendants' actions constitute commercial activity. In *Broadbent,* this Circuit clearly indicated, albeit in dicta, that the employment relationship at issue in this case is of a commercial nature. That court quoted the relevant portion of House Report 94-1487: "Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, *but not the employment of American citizens or third country nationals by the foreign state in the United States.*" *Id.* at 34 (emphasis added). The Court of Appeals commented that "[t]his report clearly marks

employment of civil servants as noncommercial for purposes of restrictive immunity. The Committee Reports establish an exception from the general rule in the case of employment of American citizens or third country nationals by foreign states." *Id.* The D.C. Circuit explained the policy rationale underlying such a carve-out for American citizens and third country nationals: "The exception leaves foreign states free to conduct 'governmental' matters through their own citizens." *Id.* In contrast, the *Broadbent* plaintiff was an American citizen employed by an international organization, not a foreign state, so that the exception was not applicable because "[international organizations'] civil servants are inevitably drawn from either American citizens or 'third' country nations. In the case of international organizations, such an exception would swallow up the rule of immunity for civil service employment disputes." *Id.* at 34.

Similarly, in *Zveiter v. Brazilian Nat'l Superintendency of Merchant Marine,* 833 F.Supp. 1089, 1093-1094 (S.D.N.Y.1993), the court found that the employment of an American citizen as a secretary in the New York office of a Brazilian agency was commercial activity. The court stated, "[a]ccording to the Report of the House Judiciary Committee, 'the employment of American citizens or third country nationals [as civil service personnel] by the foreign state in the United States,' in contrast to employment of citizens of the foreign sovereign, 'would be commercial.' " *See also Elliott v. British Tourist Auth.,* 986 F.Supp. 189, 193-194 (S.D.N.Y.1997), *aff'd,* 172 F.3d 37 (2d Cir.1999)

(unpublished table decision) ("As the legislative history makes clear, employment by a foreign state can be characterized as either commercial or governmental, depending on the nature of the employment. The hiring (and firing) of diplomatic staff and civil servants is an inherently governmental activity and therefore subject to immunity. On the other hand, the hiring (and firing) of American citizens or of clerical staff is commercial in nature and not subject to immunity.").[4]

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4. Some Circuits have not readily applied the exception that the D.C. Circuit has identified for a foreign state's employment of American citizens and third country nationals in the United States, or at least they have not treated this characteristic as dispositive in finding commercial activity. *See generally* Richard L. Garnett, *The Perils of Working for a Foreign Government: Foreign Sovereign Immunity and Employment*, 29 Cal. W. Int'l L.J. 133 (1998). In *Holden v. Canadian Consulate*, the Ninth Circuit held that the employment of an American citizen as a marketing agent for the Canadian Consulate located in San Francisco was commercial activity, not because she was a U.S. citizen employed by a foreign state in the United States, but because she was not diplomatic, civil service, or military personnel. 92 F.3d at 921-22.

The Seventh Circuit also has not considered dispositive a plaintiff's status as a third country national employed by a foreign state in the United States, although it noted that it might be relevant. In *Segni v. Commercial Office of Spain*, 835 F.2d 160 (7th Cir.1987), the Court held that the case fell within the commercial activity exception because the plaintiff was not diplomatic or civil service personnel. In a footnote, the Court also stated:

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In short, the only employment relationships of a foreign state that are governmental in nature are relationships with diplomatic, civil service, or military employees who are neither U.S. citizens nor third country nationals employed in the United States. The hiring of all other employees is commercial. Here, plaintiff's complaint alleges that plaintiff is a third country national (an Egyptian citizen) employed by a foreign state (the U.A.E.) in the United States (in the U.A.E. Embassy in Washington, D.C.).[5] Defendants

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> It is also worth noting that Segni is not a citizen of Spain. The legislative history of the FSIA suggests that an employee's status as a 'third country national' is relevant to the commercial nature of his employment. We need not determine how important this factor is, though; it is sufficient to observe that a person hired by his own country's government to work abroad should have a somewhat lesser expectation of suing his homeland in his host nation's courts.

Id. at 165 n. 7 (internal citation omitted). *But see Segni v. Commercial Office of Spain,* 650 F.Supp. 1045, 1047 (N.D.Ill.1987) (district court concluded that commercial activity exception applied because plaintiff was an Argentine national employed by Spain in the United States, and "[t]he House Report concerning the commercial activities exception clearly states that the employment of third party nationals by the foreign state in the United States is a commercial activity.").

5. The Court notes that while the premises of a foreign embassy are inviolable, they are also considered within the

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agree in their Motion To Dismiss that plaintiff is an adult citizen of Egypt employed by the U.A.E., which engages in activities within the United States only through its Washington Embassy, at which plaintiff was employed. Defs.' Mot. To Dismiss Am. Compl. at 1-2. This case therefore fits squarely into the type of employment relationships that this Circuit has recognized as being commercial activity. Whether plaintiff was a civil servant is irrelevant because even if he is a civil servant, he is a third country national employed in the United States.

Having determined that defendants engaged in a "commercial activity," the Court finds that this case falls within the commercial activity exception, because it fits within the first sentence of § 1605(a)(2): plaintiff's claims of breach of contract and defamation are "based upon a commercial activity carried on in the United States by the foreign state" since the employment was carried on in the U.A.E. Embassy in the United States. Subject matter jurisdiction therefore exists over plaintiff's claims.

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territorial jurisdiction of the United States. *See* Restatement (Third) of Foreign Relations § 466 cmt. a (1987) ("That premises are inviolable does not mean that they are extraterritorial. Acts committed on those premises are within the territorial jurisdiction of the receiving state . . . ."); *Fatemi v. United States*, 192 A.2d 525 (D.C.1963) ("a foreign embassy is not to be considered the territory of the sending state"). *Cf. Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C.Cir.1984) (United States embassies abroad were not considered within the United States for purposes of the FSIA provision allowing suit against foreign states for tortious injury "occurring in the United States.").

B. *Jury demand*

If, in a civil case, sovereign immunity does not apply, a foreign state is protected to the extent that the case must be tried without a jury. *See* 28 U.S.C. § 1330(a) (for an action in which the foreign state is not entitled to sovereign immunity, "[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) . . . ."); *Universal Consol. Companies, Inc. v. Bank of China,* 35 F.3d 243, 244-45 (6th Cir.1994) ("While the language of § 1330 might have stated the rule more clearly, . . . all federal appellate courts which have considered the issue-including the Second, Third, Fourth, Fifth, and Eleventh Circuits-have held that jury trials are not available in suits brought under the Act."). Accordingly, the Court strikes plaintiff's jury demand as to all five defendants.

II. *Personal Jurisdiction*

While the Court may have subject matter jurisdiction over this case, defendants argue that the Court must dismiss the complaint because the Court lacks personal jurisdiction over each of them. When a defendant alleges lack of personal jurisdiction, a plaintiff must present a prima facie case that personal jurisdiction exists. *See Crane v. New York Zoological Soc'y,* 894 F.2d 454, 456 (D.C.Cir.1990); *Overseas Partners, Inc. v. PROGEN Musavirlik ve Yonetim Hizmetleri, Ltd. Sikerti,* 15 F.Supp.2d 47, 50 (D.D.C.1998). This requirement must be met with respect to each defendant.

See First Chicago Int'l v. United Exch. Co., 836 F.2d 1375, 1378 (D.C.Cir.1988); *Overseas Partners*, 15 F.Supp.2d at 50. In establishing a prima facie showing of personal jurisdiction, plaintiff is entitled to having his complaint and any doubts resolved in the light most favorable to him. *GTE New Media Servs., Inc. v. Ameritech Corp.*, 21 F.Supp.2d 27, 36 (D.D.C.1998). However, plaintiff "cannot rest on bare allegations or conclusory statements and must allege specific facts connecting each defendant with the forum." *Id.; Sunlite, Inc. v. BfG Bank AG*, 849 F.Supp. 74, 75 (D.D.C.1994).

Establishing personal jurisdiction over a foreign state requires a two-step analysis. First, personal jurisdiction under the FSIA is governed by 28 U.S.C. § 1330(b), which sets forth a simple formula: personal jurisdiction is obtained when subject matter jurisdiction exists over that claim and valid service of process has been accomplished pursuant to 28 U.S.C. § 1608.[6] *See Gilson v. Republic of Ireland*, 682 F.2d 1022, 1028 (D.C.Cir.1982); *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 16 (D.D.C.1998). However, satisfying this

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6. Defendants focus on whether the District of Columbia's long-arm statute has been satisfied. However, because the FSIA applies to defendants, 28 U.S.C. § 1330(b) provides the statutory basis for personal jurisdiction, as it is "in effect, a Federal long-arm statute over foreign states." Thus, the Court considers only whether § 1330(b), and not the D.C. long-arm statute, has been satisfied. H.R. Rep. 94-1487, at 13 (1976) *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612; *see Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1109 n. 23 (D.C.Cir.1982).

statutory scheme is not sufficient, as Congress may not grant jurisdiction where it would violate the Constitution's Due Process Clause. The Court therefore must also determine whether exercising personal jurisdiction over the defendants is constitutionally permissible. *See, e.g., Creighton Ltd. v. Government of the State of Qatar*, 181 F.3d 118, 1999 WL 446009 at *6 (D.C.Cir. July 2, 1999); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 759 F.Supp. 855, 860 (D.D.C.1991).[7]

Instead of making a prima facie case that personal jurisdiction exists under this analysis, plaintiff opposes

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7. In *Flatow v. Islamic Republic of Iran*, this court recently noted this constitutional analysis is unnecessary for a foreign state because it, like the federal government and the individual states, is not a "person" for purposes of the Due Process Clause. 999 F.Supp. at 18; *see also Rios v. Marshall*, 530 F.Supp. 351, 372 n. 22 (S.D.N.Y.1981) (foreign states are not persons subject to liability under certain federal statutes). The D.C. Circuit has not resolved this issue. *Creighton Ltd.*, 181 F.3d 118, 124 (discussing in dicta the possibility that due process analysis of personal jurisdiction may not apply to foreign states). However, the *Flatow* court also noted that a foreign state as a commercial actor may be considered a "person" for constitutional due process purposes, because when it so acts, it "divests itself . . . of its sovereign character, and takes that of a private citizen." *Flatow*, 999 F.Supp. at 17 (quoting *Bank of United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 907, 6 L.Ed. 244 (1824)). Because the Court has determined that defendants engaged in a commercial activity, and because the D.C. Circuit has not yet resolved whether the due process clause applies to foreign states, the Court considers the U.A.E. a "person" and conducts the constitutional due process analysis.

the motion to dismiss for lack of personal jurisdiction by making two arguments: (1) that defendants' counsel has waived any defenses based on personal jurisdiction by stipulating to accept service on behalf of his clients; and (2) that the three defendants who brought the first motion to dismiss (the U.A.E., the Embassy, and Al-Suwaidi) waived any arguments based on personal jurisdiction that they failed to raise in the first motion to dismiss. Plaintiff then states that if the Court allows any or all of the arguments made by these defendants to stand, the Court should afford plaintiff further opportunity to brief these issues.

First, plaintiff errs in arguing that defense counsel's stipulation to accept service on behalf of his clients conferred personal jurisdiction over defendants. Defense counsel consented to service via special arrangement under 28 U.S.C. § 1608, which governs service on foreign states. It is clear, however, that simply consenting to service is not sufficient to confer personal jurisdiction because 28 U.S.C. § 1330(b) requires both service in accordance with 28 U.S.C. § 1608 and the existence of subject matter jurisdiction for personal jurisdiction. Furthermore, once the statutory requirements of § 1330(b) are met, a due process analysis must also be conducted to establish personal jurisdiction. Therefore, the Court rejects plaintiff's contention that mere stipulation to service confers personal jurisdiction.

Second, the Court is not persuaded by plaintiff's argument that the three defendants who brought the first motion to dismiss waived any personal jurisdiction

arguments that they may not have raised in the first motion to dismiss. Because the motion to dismiss the original complaint was nullified once plaintiff filed an amended complaint, the Court considers the motion to dismiss the amended complaint to be defendants' first opportunity to raise affirmative defenses.

Having rejecting plaintiff's only arguments regarding the issue of personal jurisdiction, the Court declines to afford plaintiff further opportunity to brief the issue. Plaintiff cites no legal authority for expecting a further opportunity for briefing. The Court has no desire to prolong this litigation by encouraging plaintiff's tactical decision to raise additional arguments in a piecemeal fashion. In the interest of efficiency and fairness to the parties, plaintiff should have submitted all his arguments in his opposition, making them in the alternative, instead of expecting the Court to afford a further opportunity. *Cf. Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1280 (D.C.Cir.1994) (affirming denial of plaintiff's "bare request" made in an opposition to a motion to dismiss to amend complaint if the court found the complaint inadequate).[8] Furthermore, Local Rule

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8. For the sake of comparison, this piecemeal approach is prohibited in other contexts such as requests for federal prison medical records, Freedom of Information Act (FOIA) cases, and arbitration contexts. *See Benavides v. U.S. Bureau of Prisons*, 995 F.2d 269, 273 (D.C.Cir.1993) ("As we have noted in the context of FOIA litigation, the government is not entitled to raise defenses to requests for information seriatim until it finds a theory that the court will accept, but must bring all its defenses

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108(b) requires that the opposing party shall serve and file an opposition to a motion "within 11 days of the date of service or at such other time as the Court may direct." By reserving some arguments until after the Court rules on plaintiff's current arguments, plaintiff essentially would circumvent Local Rule 108(b). The Court declines to allow this.

The Court therefore considers defendants' motion to dismiss for lack of personal jurisdiction based only on plaintiff's complaint and plaintiff's opposition to the motion to dismiss as presently before the Court. Applying 28 U.S.C. § 1330(b), the Court finds that the statutory requirements for personal jurisdiction are met as to all five defendants: subject matter jurisdiction exists through the commercial activity exception, and plaintiff has indicated in his opposition that all five

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at once before the district court."); *American Broad. Companies, Inc. v. United States Info. Agency,* 599 F.Supp. 765, 767 (D.D.C.1984) ("It makes sense that government agencies involved in FOIA litigation should be prepared to raise all claims under the FOIA, and in the alternative, at the initial stages of the proceedings, so that the plaintiff may respond, and the court rule, in the most expeditious manner."); *Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Star Co.,* 1982 WL 2098, at *4 (D.D.C. Nov.30, 1982) ("It is well established that the efficacy of the arbitration process depends on the parties raising all relevant arguments. A party cannot argue his case piecemeal, reserving certain arguments until after arbitration is complete, and then asserting the reserved argument as a defense to enforcement of an award.") (internal quotation omitted).

defendants have stipulated to service in a manner acceptable under § 1608(a)(1) and § 1608(b)(1).

The Court finds, however, that personal jurisdiction is constitutionally permissible only as to the U.A.E. and the Embassy, but not the three individual defendants. The burden is on the plaintiff to demonstrate sufficient contacts with the forum. *First Chicago Int'l v. United Exch. Co.*, 836 F.2d 1375, 1378 (D.C.Cir.1988); *TIFA, Ltd.*, 1991 WL 179098, at *8. When a defendant resides in or is present in the forum state, due process concerns are minimal. "Jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of traditional notions of fair play and substantial justice." *Burnham v. Superior Court*, 495 U.S. 604, 619, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (plurality opinion); *see Begum v. Auvongazeb*, 695 A.2d 112, 113 (D.C.1997). If the defendant is not present within the forum territory, due process requires that "he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *see World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-93, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Four factors affect whether "minimum contacts" exist: (1) the extent to which the defendants availed themselves of the privileges of American law; (2) the extent to which litigation in the United States would be foreseeable to them; (3) the inconvenience to defendants in litigating in the United

States; and (4) the countervailing interests of the United States in hearing the suit. *TIFA, Ltd.*, 1991 WL 179098, at *8; *see Gilson*, 682 F.2d at 1028-29. Also, "in assessing personal jurisdiction under either a constitutional due process standard or a statutory standard, courts may look to the contacts between the forum and agents of the defendant." *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105 (D.C.Cir.1982); *see also Texas Trading and Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 314-15 (2d Cir.1981).

As for the Embassy, the Court finds that the allegations in plaintiff's amended complaint establish personal jurisdiction over it. It is uncontroverted that the Embassy is located in the District of Columbia, obviously thus physically present in this jurisdiction. Pl.'s Am. Compl. at ¶ 4; Defs.' Mot. To Dismiss Am. Compl. at 1. Furthermore, the actions which plaintiff alleges in his amended complaint were performed on behalf of the Embassy-among them, that someone in the Embassy fired plaintiff, rehired him in the military attaché's office, dismissed him again, and made repeated phone calls to his home in Virginia to compel plaintiff to withdraw his complaint-were conducted in the United States, or at least established sufficient contact with this forum to justify maintaining personal jurisdiction over the Embassy. Defendants even state that "[t]he Embassy of the United Arab Emirates is actually managed by diplomats residing in the United States of America rather than by governmental officials in Abu Dhabi." *See* Defs.' Mot. To Dismiss Am. Compl. at 13. Therefore, the actions of these diplomats, who concededly do

maintain minimum contacts with the United States, can be imputed to the Embassy.

Regarding the U.A.E., the Court also finds that the U.A.E. maintained sufficient contacts with the District of Columbia to satisfy due process concerns. The only argument defendants make about the U.A.E. is subsumed in a blanket statement in their motion to dismiss that "no Defendant had [purposeful availment] contacts with the forum, nor did any Defendant ever avail themselves, purposefully or otherwise, of the benefits of conducting activities within the District of Columbia." However, they contradict themselves in their own motion, stating that the U.A.E. is a "sovereign nation which does not engage in activities within the United States, *except through its Washington Embassy.*" Defs.' Mot. To Dismiss Am. Compl. at 1 (emphasis added). Because courts may look to the contacts between the forum and agents of the defendant in determining whether to exercise personal jurisdiction, *Maritime Int'l Nominees Establishment,* 693 F.2d at 1105, the Court finds that the alleged actions on behalf of the Embassy, performed in the United States with respect to an individual domiciled in the United States, are sufficient to confer personal jurisdiction over the U.A.E. It is also reasonable to impute these acts to the U.A.E. to confer personal jurisdiction because the acts occurred in the United States and had direct effects on plaintiff's life in the United States. *Cf. Upton v. Empire of Iran,* 459 F.Supp. 264, 266 (D.D.C.1978) (because tortious act occurred in Iran, the effects in the United States were too attenuated from the act to confer personal

jurisdiction). It would not be inconvenient or unforeseeable for the U.A.E. to litigate in the District of Columbia, as it does maintain an embassy in the District and employs foreign nationals in its embassy.

Furthermore, it seams both reasonable and fair to exercise personal jurisdiction over the Embassy and the U.A.E. because the action at issue-namely, the termination of plaintiff's employment-occurred in the United States, the plaintiff is an Egyptian citizen domiciled in the United States, and the U.A.E. maintains an embassy in the District of Columbia. *See Sealift Bulkers*, 965 F.Supp. at 86 (exercising personal jurisdiction is reasonable and fair because case involved questions of U.S. law, plaintiff was a U.S. corporation, and foreign state maintained an embassy in the District of Columbia).

The Court finds, however, that plaintiff has not established in his amended complaint exactly how the individual defendants were involved in plaintiff's case. In listing the parties, the amended complaint sets forth conclusory allegations about each individual defendant's contacts with the United States and the District of Columbia, repeated verbatim for each individual defendant:

> [defendant] is an individual who holds office in the Embassy of the UAE and who from time to time functions as an instrumentality, arm, agency or representative of the UAE in the United States and the District of Columbia and

> who has substantial contact with the United States and with the District of Columbia and who engages in and transacts commercial activity, and engages in a regular course of commercial conduct in the United States and the District of Columbia, and which did, engaged in and conducted the commercial activity, transaction and conduct which forms the basis of this action.

Pl.'s Am. Compl. at ¶¶ 6-8. Plaintiff provides no specific factual support for these allegations. In fact, beyond describing them as parties, plaintiff makes no other reference at all to Al-Suwaidi and Al-Khazragi in his amended complaint. Plaintiff mentions Al-Nahyan only one more time to say that plaintiff was dismissed from his position, "which dismissal . . . was executed by Shikh Nahian Bin Mubark Al Nahian." Pl.'s Am. Compl. at ¶ 9. While the Court will consider all allegations of jurisdictional facts in a light most favorable to the assertion of personal jurisdiction, conclusory jurisdictional statements will not suffice. Plaintiff provides no specific factual information to allow the Court to infer that Al-Nahyan may have executed his dismissal, such as whether Al-Nahyan had authority to effect the dismissal or how Al-Nahyan executed the dismissal. The Court finds that this statement alone does not make a prima facie showing of personal jurisdiction. Consequently, the Court dismisses the three individual defendants Al-Nahyan, Al-Suwaidi, and Al-Khazragi.

Appendix E

III. *Defamation Claim*

Count II of plaintiff's amended complaint asserts that defendants published statements that disparaged plaintiff's professional and personal reputation, called into question his professional ethics, abilities, and competence, and held him up to ridicule in the presence of third parties. Defendants contend that the Court should dismiss Count II as a matter of law because the FSIA provides immunity for any claim arising out of libel or slander. Specifically, 28 U.S.C. § 1605(a)(5) provides an exception to sovereign immunity for any tortious act or omission of a foreign state in which money damages is sought for personal injury, death, or damage to or loss of property that occurred in the United States. However, 28 U.S.C. § 1605(a)(5)(B) creates an exception to this exception, and states that foreign states are immune from tort actions based on malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. Defendants therefore claim that § 1605(a)(5)(B) bars plaintiff's defamation claim.

This Court disagrees with defendants' reading of the concededly confusing structure of § 1605(a). Section 1605(a)(2) and § 1605(a)(5)(B) are mutually exclusive provisions. This court has stated that "[t]he clear language of the statute declares that section 1605(a)(5) does not apply to section 1605(a)(2). Therefore, the exception to section 1605(a)(5) contained in section 1605(a)(5)(B) . . . does not apply to claims brought under § 1605(a)(2)." *Foremost-McKesson, Inc.*, 759 F.Supp. at

858-59. *See Gilson,* 682 F.2d at 1027-28 n. 27 (noting in dictum that § 1605(a)(5)(B) does not limit § 1605(a)(2)); *see also Export Group v. Reef Indus.*, 54 F.3d 1466, 1474-75 (9th Cir.1995); *Letelier v. Republic of Chile,* 748 F.2d 790, 795 (2d Cir.1984). Stated another way, foreign states are not protected from actions based on the torts listed in § 1605(a)(5)(B) when they are acting in a commercial capacity. Because the Court has determined that this case falls within the commercial activity exception embodied in § 1605(a)(2), defendants cannot avail themselves of the tort exception contained in § 1605(a)(5)(B).

IV. *Act of State Doctrine*

Defendants contend that the Act of State doctrine precludes the Court's review of the challenged conduct. Historically, the Act of State doctrine has been an absolute rule of judicial abstention, whereby "[t]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill v. Hernandez,* 168 U.S. 250, 252, 18 S.Ct. 83, 42 L.Ed. 456 (1897); *see also Riggs Nat'l Corp. & Subsidiaries v. Commissioner of Internal Revenue Service,* 163 F.3d 1363, 1367 (D.C.Cir.1999). The passage of the FSIA and subsequent Supreme Court cases have caused some confusion over the applicability of the Act of State doctrine. *See Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). Fortunately, the Court can dispense easily with

defendants' argument because the Act of State doctrine applies only when the actions of the foreign state occur within that foreign state. *See Flatow*, 999 F.Supp. at 21. Here, the challenged act occurred within the United States, since as previously noted, a foreign state's embassy is considered to be within the host country's territory. Therefore, the Act of State doctrine is inapplicable to this case.

V. *Acts Occurring Within a Foreign Mission*

Defendants make a vague argument that the Court should not exercise jurisdiction over this case because the acts at issue occurred within the foreign mission of the U.A.E. Defendants rely in part on 22 U.S.C. § 254b, which entitles nonparties to the Vienna Convention on Diplomatic Relations, such as the U.A.E., to the same privileges and immunities specified in the Vienna Convention on Diplomatic Relations. Defendants also invoke Article 43 of the Vienna Convention on Consular Relations, which states that "Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions." Defendants stress that the principle of comity dictates that the government of the U.A.E. and the individual defendants not be subjected to American law. Furthermore, defendants state that they should not be subject to American law "especially when the law of the U.A.E. provides plaintiff with a forum in Abu Dhabi in which to address his suit." Defs.' Mot. To Dismiss Am. Compl. at 19.

Appendix E

The Court finds that while the U.A.E. may be afforded the same protections of the Vienna Convention on Diplomatic Relations as parties to that treaty are, defendants never indicate what protection they are requesting or for which defendants. Furthermore, as plaintiff notes in his opposition, Article 43 of the Vienna Convention on Consular Relations does not provide defendants any protection from suit because none of the defendants has been alleged to be a consular employee or officer.[9] In addition, although defendants do not elaborate on their contention that plaintiff has a forum for his suit under U.A.E. law, this does not appear to affect plaintiff's ability to bring suit under the FSIA. The FSIA allows foreign citizens to bring their disputes with foreign states in U.S. courts. *Verlinden B.V.*, 461

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9. "Consuls are in principle distinct in function and legal status from diplomatic agents. Though agents of the sending state for particular purposes, they are not accorded the type of immunity from the laws and enforcement jurisdiction of the receiving state enjoyed by diplomatic agents." Ian Brownlie, *Principles of Public International Law*, (4th ed.1990). *See* Gregory Dean Gisvold, Note, *Strangers in a Strange Land; Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 Minn. L.Rev. 771, 803 (1994) ("Consular authorities may differ from diplomatic authorities. . . . Where a State has not established a formal diplomatic mission, it will often choose to conduct diplomatic relations through consular posts."). Clearly, the U.A.E. and the Embassy are not consular employees or officers, and defendants have not alleged that the individual defendants-who are the Director of the State Audit Institution, the Director of Financial and Administrative Affairs, and the Minister of Higher Education and Scientific Research-are consular officials or employees.

U.S. at 489-492, 103 S.Ct. 1962 ("Congress was aware of concern that our courts [might be] turned into small international courts of claims, . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world . . . . If an action satisfies the substantive standards of the Act, it may be brought in federal court regardless of the citizenship of the plaintiff."). The Court therefore finds that the fact that defendants' actions occurred within a foreign mission does not preclude the Government of the U.A.E. from being subject to this Court's jurisdiction.

VI. *Head of State Immunity*

Defendants assert that the three individual defendants-Al-Suwaidi, Al-Khazragi, and Al-Nahyan-are entitled to head of state immunity. Because the Court dismisses these three individual defendants for lack of personal jurisdiction, the Court need not dispositively address this defense.[10]

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10. If the Court had not dismissed the individual defendants, this defense would not afford them any protection. At common law, this absolute immunity was afforded to heads of state as a matter of grace and comity, not of right. *Flatow,* 999 F.Supp. at 22; *Lafontant v. Aristide,* 844 F.Supp. 128, 131-32 (E.D.N.Y.1994). The FSIA does not explicitly provide immunity for heads of state. *See* Jerrold L. Mallory, Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings,* 86 Colum. L.Rev. 169, 173-75 (1986). Most courts that have addressed this question have allowed immunity to persons whom the United States government acknowledges as the official, sitting head of state; the judiciary must defer to the Executive Branch's

(Cont'd)

(Cont'd)
recognition of heads of state. *Flatow*, 999 F.Supp. at 24; *Jungquist v. Nahyan*, 940 F.Supp. 312, 321 (D.D.C.1996), *rev'd on other grounds*, 115 F.3d 1020 (D.C.Cir.1997). In some cases, the Department of State will file a "suggestion of immunity" to indicate whether the United States Government considers the defendant a head of state. *See Lafontant*, 844 F.Supp. at 134-35; *Saltany v. Reagan*, 702 F.Supp. 319, 320 (D.D.C.1988). Some courts have suggested that absent a formal suggestion of immunity, a putative head of state should receive no immunity. *See generally United States v. Noriega*, 117 F.3d 1206, 1211-12 (11th Cir.1997).

None of the defendants invoking the head of state immunity is alleged to be the sitting official head of state of the U.A.E. Nor has the State Department submitted a suggestion of immunity on their behalf or offered any guidance. Defendants' argument primarily asserts that as U.A.E. government officials, each of these defendants acts as an official representative of the President of the U.A.E., and therefore, they should be afforded head of state immunity. This argument, however, misconstrues the current form of the head of state immunity doctrine, which is limited only to the sitting official head of state. *See Flatow*, 999 F.Supp. at 24. The Court declines to expand the head of state immunity to cover all agents of the head of state. *See Republic of Philippines v. Marcos*, 665 F.Supp. 793, 797-98 (N.D.Cal.1987) (refusing to expand the head of state doctrine "to encompass all government officials of a foreign state to whom the State Department chooses to extend immunity. There is no precedent for such a radical departure from past custom . . . .") (internal citation omitted). The Court rejects defendants' claim to head of state immunity. *See First American Corp. v. Al-Nahyan*, 948 F.Supp. 1107 (D.D.C.1996) (denying head of state immunity to Minister of Defense of the U.A.E. and brother of current ruler

(Cont'd)

Appendix E

Conclusion

The Court concludes that subject matter jurisdiction over all of plaintiff's claims exists pursuant to the commercial activity exception of the FSIA, that personal jurisdiction exists over two out of the five defendants, that the Act of State doctrine and the Head of State doctrine do not preclude the Court's review, and that the Court's review is not precluded because the acts occurred within a foreign mission. Accordingly, the Court grants in part defendants' motion to dismiss the amended complaint only to the extent that the Court lacks personal jurisdiction over defendants Al-Suwaidi, Al-Khazragi, and Al-Nahyan.

(Cont'd)
of Dubai because he was not a sitting head of state of the U.A.E.); *Jungquist*, 940 F.Supp. at 321 (grandson of the ruler of Abu Dhabi who was the Chairman of the Crown Prince's Court was not entitled to head of state immunity because the Executive Branch had made no determination as to his status as a head of state of the U.A.E.).

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED SEPTEMBER 21, 2007

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7075

September Term, 2007

96cv01943

Filed On: September 21, 2007

[1068421]
Mohamed Salem El-Hadad,

Appellee

v.

United Arab Emirates and The Embassy of the United Arab Emirates,

Appellants

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

Appendix F

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

APPENDIX G — LEGISLATIVE HISTORY TO THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

P.L. 94-583, see page 90 Stat. 2891

House Report (Judiciary Committee) No. 94-1487, Sept. 9, 1976 [To accompany H.R. 11315]

Senate Report (Judiciary Committee) No. 94-1310, Sept. 27, 1976 [To accompany S. 3553]

Cong. Record Vol. 122 (1976)

DATES OF CONSIDERATION AND PASSAGE

House September 29, 1976

Senate October 1, 1976

The House bill was passed in lieu of the Senate bill.

The House Report is set out.

HOUSE REPORT NO. 94-1487

* * *

Purpose

* * *

Appendix G

Statement

* * *

At the hearings on the bill it was pointed out that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes. Instances of such contact occur when U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.

At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state. Unlike other legal systems, U.S. law does not afford plaintiffs and their counsel with a means to commence a suit that is specifically addressed to foreign state defendants. It does not provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity, and, in the event a plaintiff should obtain a final judgment against a foreign state or one of its trading companies, our law does not provide the

plaintiff with any means to obtain satisfaction of that judgment through execution against ordinary commercial assets.

* * *

First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts:

Second, the bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. At present, this is not always the case. Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications

of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to reeognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

* * *

(1) which is a separate legal person, (2) which is an organ of a foreign state or of a political subdivision of a foreign state, or a majority of whose shares or other ownership interest is owned by a foreign state or by a foreign state's political subdivision, and (3) which is neither a citizen of a State of the United States as defined in 28 U.S.C. 1332(c) and (d) nor created under the laws of any third country.

* * *

(d) *Commercial activity.*— . . .

* * *

. . . Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil

service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

The courts would have a great deal of latitude in determining what is a "commercial activity" for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

* * * *

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SUPREME COURT, U.S.

No. 07-853

In the Supreme Court of the United States

UNITED ARAB EMIRATES AND THE EMBASSY OF THE UNITED ARAB EMIRATES,

Petitioners,

v.

MOHAMED SALEM EL-HADAD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

The commercial activity exception to the Foreign Sovereign Immunities Act grants federal courts subject matter jurisdiction over suits against foreign states "in which the action is based upon a commercial activity carried on in the United States by the foreign state * * *." 28 U.S.C. § 1605(a)(2).

The question presented is whether an action for breach of contract and defamation filed by a third country national who worked as a non-civil servant, non-policymaking auditor and accountant in the office of a foreign state's cultural attaché, performing tasks identical to those performed in commercial enterprise, constitutes an "action * * * based upon a commercial activity" within the meaning of the Foreign Sovereign Immunities Act.

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Segni v. *Committee Office of Spain*,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 496 F.3d 658. The district court's initial opinion denying petitioners' motion to dismiss (Pet. App. 94a-125a) is reported at 69 F. Supp. 2d 69 (D.D.C. 1999). The court of appeals' opinion on interlocutory appeal reversing and remanding the district court's initial determination (Pet. App. 79a-93a) is reported at 216 F.3d 29 (D.C. Cir. 2000). The district court's opinion after remand (Pet. App. 70a-78a) and its subsequent opinion on the merits (Pet. App. 23a-69a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), provides in pertinent part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state * * * .

STATEMENT

Petitioners portray the decision below as an unprecedented intrusion on sovereign immunity. But the "commercial activity" exception to the Foreign Sovereign Immunities Act and this Court's precedents plainly contemplate that lawsuits relating to

foreign states' employment relationships may be heard by U.S. courts, and such claims have in fact been entertained on that basis. Moreover, the United States regularly submits to the jurisdiction of foreign courts with respect to employment claims similar to the one pressed here, confirming that the holding below breaks no new ground. Petitioners cannot demonstrate a conflict among the lower courts, nor have they shown that the question presented is one of substantial importance. Review by this Court therefore is not warranted.

A. Statutory Background

Prior to the enactment of the Foreign Sovereign Immunities Act ("FSIA"), "there [were] no comprehensive provisions in [United States] law available to inform parties when they [could] have recourse to the courts to assert a legal claim against a foreign state." H.R. Rep. No. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605. Instead, "the State Department would determine in the first instance whether a foreign state was entitled to immunity and make an appropriate recommendation to the courts." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 357 n.5 (1993). See also *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486-488 (1983).

Congress enacted the FSIA in 1976 to provide for "the determination by United States courts of the claims of foreign states to immunity * * * ." 28 U.S.C. § 1602. Congress was concerned that allowing the State Department to make immunity determinations risked attempts by "the foreign state * * * to bring diplomatic influences to bear upon the State Department's determination." H.R. Rep. No. 94-1487, at 7 (1976). The Act therefore transferred the immunity determination "from the executive branch to the ju-

dicial branch" in order to "free[]" the State Department "from pressures from foreign governments to recognize their immunity from suit." *Ibid.* That change aligned U.S. law with the practices of "virtually every other country – where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency." *Ibid.*

State Department practice had followed "the restrictive theory of foreign sovereign immunity[,] under which immunity is confined to suits involving the foreign sovereign's public acts and does not extend to cases arising out of its strictly commercial acts." *Verlinden*, 461 U.S. at 481. The Act's "manifest purpose" was "to codify the restrictive theory of foreign sovereign immunity." *Nelson*, 507 U.S. at 363.

Section 1605(a)(2), the provision at issue in this litigation, precludes recognition of sovereign immunity in, and grants federal courts subject matter jurisdiction over, any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." A "commercial activity" may range from "a regular course of commercial conduct" to "a particular commercial transaction or act." 28 U.S.C. § 1603(d).

Congress provided that "the nature of the course of conduct" rather than its "purpose" determines the commercial character of the activity. *Ibid.* Thus:

> [T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a

> private party engages in "trade and traffic or commerce."

Republic of Argentina v. *Weltover*, 504 U.S. 607, 614 (1992) (internal quotation marks omitted).

"Commercial activity" within the meaning of Section 1605(a)(2) thus encompasses "the sort of action by which private parties can engage in commerce" as opposed to action that is "peculiarly sovereign in nature," such as "the powers of police." *Nelson*, 507 U.S. at 361-62. Employment relationships plainly can constitute "commercial activity" under this standard. Indeed, the Court's analysis in *Nelson* presupposed that a claim based on the foreign state's recruitment and employment of the plaintiff would fall within the "commercial activity" exception (*id.* at 358), a point that Justice White emphasized in his concurring opinion: "'[A] foreign government's * * * employment or engagement of laborers, clerical staff or marketing agents * * * would [therefore] be among those included within' the definition of commercial activity." *Id.* at 365 (White, J., concurring in the judgment) (quoting H.R. Rep. No. 94-1487, at 16 (1976), and S. Rep. No. 94-1310, at 16 (1976)).

Congress recognized that given the myriad factual settings in which the issue might arise, it was "unwise to attempt an excessively precise definition" of commercial activity. H.R. Rep. No. 94-1487, at 16 (1976). Courts must consider the factual circumstances presented by individual cases "in determining what is a 'commercial activity.'" *Ibid.*

B. Factual Background

Respondent Mohamed Salem El-Hadad, an Egyptian citizen, was for many years a successful auditor in Egypt, the United Arab Emirates, and Washing-

ton, D.C. Pet. App. 24a-25a. From 1982 to 1992, respondent worked as an auditor in the U.A.E.'s Ministry of Education. *Id.* at 25a. While on vacation in the United States in the summer of 1992, respondent learned that the cultural attaché's office of the U.A.E.'s Washington embassy was seeking to hire an auditor. Respondent applied for and was offered the job. *Ibid.* Respondent formally resigned his position in the U.A.E. (*ibid.*) and relocated with his family to Washington at his personal expense (*id.* at 44a) to work as an accounting auditor for the cultural attaché's office.[1]

The terms of respondent's job offer were governed by the Local Employees Laws and Regulations for the U.A.E. Missions Abroad, 1983 ("LER"). *Id.* at 26a. The LER explained that a U.A.E. mission's "local employees" – a class consisting of administrative, clerical and maintenance workers – could be nationals of the host country or, in some circumstances, nationals of a third country. *Id.* at 13a-14a. According to the LER, local employees from the host country or a third country could not be civil servants, because that status is reserved for U.A.E. citizens. *Id.* at 14a.

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[1] Petitioners claim that respondent was "*brought* [to the United States] by the UAE from Abu Dhabi." Pet. 3 (emphasis supplied). See also *id.* at 30 (respondent was "brought from overseas"). To the extent petitioners seek to imply that respondent's move to Washington constituted a transfer from his previous job in Abu Dhabi, the record makes clear that is not true. The district court found that respondent's employment in Washington was "separate and unrelated to his prior employment in the UAE." Pet. App. 75a. The court of appeals concluded that "there can be no question that [respondent] formally and completely terminated his employment in the U.A.E. before beginning work in the United States." *Id.* at 14a.

Respondent commenced his employment in January 1993. *Id.* at 26a. His position required him to perform typical auditing tasks, including reviewing the expenditures and accounting methods of the cultural attaché's office and reconciling bank statements. Respondent also supervised other office accountants. *Ibid.* Respondent "had no role in the creation or administration of government policy * * * [in] political deliberations or government decision-making * * * [and] did not represent or act or speak for the UAE government." *Id.* at 39a.[2]

In the course of performing these traditional auditing functions, respondent in mid-1993 discovered an embezzlement scheme involving the cultural attaché and other mission employees. *Id.* at 27a. Respondent reported these matters to authorities in the U.A.E., who initiated an official investigation. *Ibid.* In December 1993, an investigative team from the U.A.E.'s Ministry of Finance confirmed the embezzlement. *Ibid.* The cultural attaché and others implicated in the scandal were fired the following year. *Id.* at 28a.

Well over a year after the cultural attaché's removal, respondent was accused of participating in the very embezzlement he had uncovered. *Id.* at 28a-29a. Despite a complete absence of evidence indicating any impropriety on the part of respondent and letters of support from embassy officials (*id.* at 31a-

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[2] Petitioners erroneously characterize respondent as "a senior Embassy official." Pet. 30. See also *id.* at 3. The district court made no such finding; rather, as petitioners concede (*id.* at 13), the district court found that respondent "did standard accounting work."

33a), the Ministry of Higher Education and Scientific Research (the "Higher Education Ministry"), which had final authority over the matter, ordered respondent's dismissal. Respondent's employment was terminated in February 1996. *Id.* at 34a.

In the summer of 1996, an official from the Higher Education Ministry met with the employees of the cultural attaché's office and told them that respondent had been discharged for "not doing his job properly or honestly." *Id.* at 35a. Similar allegations were memorialized in published documents. *Id.* at 56a.

Over the course of the next year, respondent's applications for a variety of accounting jobs in the Washington area were rejected after the prospective employers made inquiries about his prior employment. *Id.* at 35a-36a. On at least one occasion, U.A.E. embassy personnel informed a prospective employer that respondent had been terminated for cause. *Ibid.* Since his firing in 1996, respondent has not received a single job offer in his field and his efforts to find other profitable employment have failed as well. *Id.* at 36a.

C. Proceedings Below

Respondent filed the instant action for breach of contract and defamation in August 1996, asserting claims under District of Columbia law.

1. The district court denied petitioners' motion to dismiss on sovereign immunity grounds, holding that respondent's claims fell within the FSIA's commer-

cial activity exception. Pet. App. 94a-125a.[3]

Identifying petitioners' employment and termination of respondent as the relevant activity (*id.* at 101a), the court held that a foreign state's employment of Americans or third country nationals in the United States was per se a commercial activity (*id.* at 106a). Because respondent was a third country national employed by a foreign state in the United States, the court determined that Section 1605(a)(2) conferred jurisdiction over respondent's claims. Pet. App. 107a.

2. The court of appeals reversed and remanded on petitioners' interlocutory appeal. *Id.* at 79a-93a. It rejected the district court's bright line rule and instead directed the district court to undertake several factual inquiries relevant to determining the "ultimate question to be answered[:] * * * whether El-Hadad's employment constituted commercial activity." *Id.* at 87a. The court of appeals specified five factual inquiries relevant to the commercial activity determination: whether respondent's job fell within the U.A.E.'s definition of civil service; whether respondent and petitioners had "a true contractual arrangement, or [respondent's] 'contract' claim instead [was] based, as the U.A.E. contends, solely upon the civil service laws of the U.A.E."; what relationship, if any, existed between respondent's employment in Washington and his previous employment in the U.A.E.; the nature of respondent's work; and the relevance of respondent's nationality to the facts of the case. *Id.* at 87a-88a.

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[3] The court dismissed for lack of personal jurisdiction claims against three U.A.E. officials named as defendants.

The court cautioned that it did "not regard [these inquiries] as an exclusive list, nor as necessarily applicable in all cases." *Id.* at 87a. A case-specific, multifactor inquiry was required, the court said, because "Congress expressly concluded that it was unwise to attempt an excessively precise definition of commercial activity * * *." *Id.* at 89a (citation and internal quotation marks omitted).

3. Following the submission of additional evidence and briefing on the immunity issue, the district court, applying the court of appeals' multifactor approach, issued a pretrial order denying petitioners' renewed motion to dismiss on sovereign immunity grounds. *Id.* at 70a-78a. The court found that respondent "had a contractual arrangement with the UAE that did not include '[c]ivil servant benefits'" (*id.* at 75a); that his employment in Washington was "separate from and unrelated to his prior employment in the UAE" (*ibid.*); and that he "had no role in the creation of UAE government policy and was not privy to UAE political deliberations" (*id.* at 76a). Based on these findings and petitioners' "fail[ure] to present evidence of other factors tending to show [respondent's] civil service status or that his work did not constitute commercial activity," the district court held that the commercial activity exception conferred jurisdiction over respondent's claims. *Id.* at 77a-78a.

4. The district court again addressed the sovereign immunity issue following trial, concluding that the evidence adduced at trial "only reinforced [its] decision." *Id.* at 37a n.7. The court rejected petitioners' attempts to highlight similarities between respondent's employment terms and those of U.S. civil servants as "unpersuasive." *Id.* at 42a. Relying on

the Second Circuit's opinion in *Kato* v. *Ishihara*, 360 F.3d 106 (2d. Cir. 2004), the court explained that it would not look to "whether th[e] employment resembles the contemporary civil service of the American democracy, but [would] instead inquire whether the particular actions that the foreign state performs [through that employee] * * * are the type of actions by which a private party engages in trade and traffic or commerce." *Ibid.* (internal quotation marks omitted) (quoting *Kato*, 360 F.3d at 114)).

The record at trial "provide[d] no evidence that El-Hadad had any more discretion in conducting his audits or that he executed his duties with any more state authority than an external auditor on contract would have had." Pet. App. 39a. The court therefore concluded that respondent's "employment as an internal auditor of accounts was a commercial activity, as that term is defined by the FSIA." *Id.* at 42a.

The district court entered judgment in favor of respondent on the breach of contract and defamation claims. *Id.* at 43a-69a. It found that petitioners' allegations of impropriety on the part of respondent were "at least false" and therefore termination of respondent's employment constituted a breach of contract. *Id.* at 52a. The written and spoken statements made by petitioners and at least one of their officials were false and defamatory (*id.* at 58a-66a) and, the court found, "destroyed [respondent]'s professional life" (*id.* at 67a). The court awarded respondent $1,745,961 in combined damages on the contract and defamation claims. *Id.* at 55a, 67a.

4. A unanimous panel of the court of appeals affirmed in relevant part. The "ultimate question," the court said, "is whether [respondent's] employment

constituted commercial activity." *Id.* at 9a (citation omitted). The court utilized a two-step inquiry to resolve this question.

It first asked whether respondent was a civil servant, in which case his claims would fall outside the commercial activity exception. The court adopted a "flexible and inclusive approach to determining whether a foreign government's employee is a civil servant." *Ibid.* That approach required examining the case-specific factors the court of appeals had identified in its prior opinion as most relevant to respondent's particular employment situation. *Id.* at 12a. The court reviewed in detail the evidence relating to these factors. It concluded that although "[m]ulti-factor tests tend to be inconclusive * * * the evidence here suggests El-Hadad is *not* a civil servant." *Id.* at 17a (emphasis in original). Even had that inquiry been "inconclusive," however, "that very fact, together with the U.A.E.'s burden of proof, would [have] decide[d] the matter in El-Hadad's favor." *Ibid.*

Second, the court examined the nature of respondent's work, because an "employee [who] might not be a civil servant * * * [could] still be engaged in quintessentially governmental work * * *." *Id.* at 8a-9a. It assessed "whether [respondent's] work involves the exercise of 'powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns.'" *Ibid.* (quoting *Nelson*, 507 U.S. at 360).

A "distinctive mark of governmental work," the court observed, "is discretionary involvement with sovereign law or policy." *Id.* at 18a. Respondent's employment did not have this key characteristic. Re-

spondent "had no role in the creation of governmental policy" but rather performed routine accounting duties "of a character easily found in commercial enterprise." *Ibid.* Because respondent "was not a civil servant * * * and [because] his work did not involve the exercise of distinctively governmental powers" the court held that the district court correctly applied the commercial activity exception to deny petitioners sovereign immunity. *Id.* at 2a.[4]

5. Petitioners filed a petition for rehearing and rehearing en banc. Their request was denied with no member of the court requesting a vote. *Id.* at 127a.

ARGUMENT

Review of the court of appeals' fact-bound ruling plainly is not warranted. The decision below accords with the text of the "commercial activity" exception and is entirely consistent with the decisions of this Court and with the decisions of numerous courts – and the FSIA's legislative history – recognizing that foreign governments' employment relationships may be commercial in nature. Moreover, the United States' practice of routinely submitting to the jurisdiction of foreign courts in employment cases abroad demonstrates that the decision below breaks no new or unusual ground.

Petitioners assert the existence of a conflict among the lower courts, but – as the opinions below demonstrate – this is an area of the law in which outcomes are heavily fact-dependent. Some courts may apply different labels to their analysis, but they all assess the same factors in determining whether

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[4] The court of appeals remanded the case on an unrelated issue related to the calculation of damages. Pet. App. 21a-22a.

the particular employment context constitutes a "commercial activity." The differing results to which petitioners point are the consequence of different factual settings rather than inconsistent legal standards.

In view of the fact-bound nature of the inquiry, moreover, intervention by this Court would have limited value. Any legal standard would have to be general and heavily fact-dependent to accommodate the variety of factual situations that arise. This Court likely could do nothing more than identify the relevant factual considerations – precisely what the lower courts already have done.

Finally, the question presented lacks substantial importance. There are fewer than twenty reported wrongful termination cases raising the commercial activity exception in the last thirty years. Even more telling, the United States government has not participated at any stage of this litigation, confirming that the case presents no issue of practical concern.

I. The Court Of Appeals Correctly Applied The Commercial Activity Exception.

A. The Decision Below Accords With The Plain Language Of The FSIA.

The "beginning point" of statutory interpretation "must be the language of the statute." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). The FSIA provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state * * *." 28 U.S.C. § 1605(a)(2). The Act defines "commercial activity" to mean:

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

Id. § 1603(d).

The statute requires a court to identify a "regular course of commercial conduct or a particular transaction or act" that the claim is "based upon." The court then must determine whether the conduct is commercial by "reference to [its] nature" rather than to its purpose. *Nelson*, 507 U.S. at 356-59. See also *Weltover*, 504 U.S. at 617 (stating that "the statute unmistakably commands" that the commercial character of an activity be determined by reference to its nature and not its purpose). The key inquiry is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce." *Id.* at 614 (internal quotation marks omitted).[5]

The relevant conduct here is respondent's employment as an auditor tasked with reviewing expenditures and accounting methods, reconciling bank statements and supervising other accountants. These activities are plainly commercial. As the district court concluded:

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[5] Petitioners invoke (Pet. 18) *De Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985), to argue that "profit" is the appropriate test for commercial activity. But this Court's subsequent decision in *Nelson* squarely rejected a "profit motive" standard. 507 U.S. at 360.

> Audits and auditors are an integral part of a regular course of commercial conduct. The orderly conduct of commerce and trade depends on audits and auditors. * * * Thus, the plain language of the FSIA statute leads to the conclusion that El-Hadad's employment as an internal auditor of accounts was a commercial activity, as that term is defined by the FSIA.

Pet. App. 41a-42a.

The court of appeals similarly rested its decision on the "resemblance between 'the outward form' of [respondent's] conduct and powers and those of private citizens." Pet. App. 18a (quoting *Weltover*, 504 U.S. at 617). It pointed out that respondent "had no role in the creation of governmental policy * * * * [and] [i]nstead, El-Hadad did standard accounting work * * * of a character easily found in commercial enterprise." *Ibid.* (citation omitted). The court thus properly held that respondent's claim fell within FSIA's commercial activity exception.[6]

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[6] Petitioners emphasize (Pet. 10) the court of appeals' statement that the question of respondent's civil service status was "exceedingly close" (Pet. App. 12a) and assert (Pet. 12) that the court of appeals failed to engage in meaningful analysis. But the court of appeals' opinion (Pet. App. 1a-22a) records that court's close review of the factual record, which included reliance on a letter from the U.A.E. cultural attaché stating that respondent "'doesn't have the [c]ivil service benefits'" common to other U.A.E. employees (*id.* at 13a (citation omitted)).

Petitioners also argue (Pet. 8-9) that the district court on remand failed to apply the standard specified by the court of appeals in its initial decision. But the court of appeals did not find any such deficiency in its detailed review of the district court's determination. See Pet. App. 12a-18a. And petitioners did not

The correctness of the holding below is confirmed by State Department practice prior to enactment of the FSIA. This Court has repeatedly held that "the meaning of 'commercial' for purposes of the Act must be the meaning Congress understood the restrictive theory to require at the time it passed the statute." *Nelson*, 507 U.S. at 359 (1993) (citing *Weltover*, 504 U.S. at 612-13). As we have discussed (see page 3, *supra*), the State Department applied this "restrictive theory prior to adoption of the FSIA.

In one of the last requests for a letter of immunity received prior to the enactment of FSIA, the Department recognized that the employment of an individual to perform services in connection with a public relations function was not a uniquely governmental activity, but rather resembled a commercial transaction. Office of the Legal Advisor, U.S. Dep't of State, Digest of United States Practice in International Law 1977, app. at 1079-80 (1977). The Department declined to provide a letter of immunity because "it would not be appropriate to recognize sovereign immunity in this case." *Ibid.*

That pre-FSIA standard is reflected in the FSIA's legislative history, which states that the commercial activity encompasses the "employment or engagement of laborers, clerical staff or public relations or marketing agents" and excludes "the employment of diplomatic, civil service, or military personnel." H.R. Rep. No. 94-1487, at 16 (1976). The court of appeals' determination in this case is thus entirely consistent with the pre-FSIA standard that Congress adopted when it enacted the statute.

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argue before the district court or court of appeals for changes in the factual inquiries specified in the court of appeals' initial opinion.

Finally, the United States' construction of the FSIA's "commercial activity" exception in the context of employment claims is consistent with both its pre-FSIA position and the decision of the court below. Thus, the United States has taken the position that, in the context of wrongful termination claims of foreign state employees, FSIA requires "a detailed factual inquiry" to determine whether sovereign immunity may be asserted in wrongful termination claims filed in U.S. courts by foreign states' employees. See Statement of Interest of the United States at 12, 17-19, *Mukkaddam* v. *Permanent Mission of Saudi Arabia to the United Nations*, 111 F. Supp. 2d 460 (S.D.N.Y. 2000) (No. 99 Civ. 3354) [hereinafter Mukaddam Statement of Interest], *available at* http://www.state.gov/documents/organization/6651.doc.

Indeed, the United States has expressly endorsed the approach of the D.C. Circuit taken in this case. *Id.* at 16-17. (expressing the government's agreement with the analytical framework and the factors to be considered when applying the commercial activity exception that were adopted in the first court of appeals decision in this case). That too confirms the correctness of the decision below.[7]

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[7] Petitioner asserts (Pet. 26-27) that the court of appeals' interpretation of the statutory phrase "based upon" – in the statutory standard providing that immunity does not apply when the "action is *based upon* a commercial activity" – is inconsistent with this Court's decision in *Nelson*. That contention is without merit. In *Nelson*, this Court held that "based upon" means "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. at 357. There, the plaintiff was arrested, beaten and tortured by the Saudi Arabian *police* after repeatedly complaining of procedures at a Saudi hospital. Although the Court accepted that the plaintiff's employment by the hospital as a "monitoring systems

B. The Court Of Appeals' Decision Conforms With The United States' Practice In Invoking Sovereign Immunity Abroad.

Petitioners claim (Pet. 4) that the decision below "pernicious[ly]" interferes with "the internal affairs of foreign nations." But the United States itself routinely submits to the jurisdiction of foreign courts in cases "involving conditions of employment or discharge at its diplomatic and consular missions in other countries" because it considers such cases "commercial in nature." Mukaddam Statement of Interest, *supra*, at 21.[8] The government's sovereign immunity practice thus wholly undermines petitioners' claim.

It is United States policy "not to plead sovereign immunity in foreign courts for instances where, under United States law, the United States would not recognize a foreign state's immunity." Office of the

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engineer" constituted "commercial activity" for purposes of § 1605(a) (see 507 U.S. at 358), it concluded that his personal injury claim was not based upon commercial activity because the "[e]xercise of the *powers of police and penal officers* is not the sort of action by which private parties can engage in commerce" (*id.* at 362 (emphasis added)). In this case, by contrast, respondent's allegations are directed at his superiors' actions in *firing* him and thereafter *defaming* him as he attempted to secure new employment. Those actions were clearly "based upon" *respondent's* employment to perform "commercial activity" under § 1605(a), and unlike the exercise of "powers of police and penal officers" were by no means "peculiarly sovereign in nature" (507 U.S. at 361). Indeed, as the court of appeals observed (Pet. App. 7a-8a), focusing the commercial activity analysis on "the employment relationship between [respondent] and the U.A.E. embassy as a whole" was "not in dispute in [this] case."

[8] Other countries follow a similar practice. *See* Mukaddam Statement of Interest, *supra*, at 23.

Legal Adviser, U.S. Dep't of State, Digest of United States Practice in International Law 1989-1990, at 295 (2003). With respect to employment termination claims of foreign nationals employed at U.S. missions abroad, the United States has disclaimed sovereign immunity in foreign courts because such "claim[s] [are] within the commercial claim exception to foreign sovereign immunity under U.S. law." *Ibid.*[9]

Only in rare cases where the specific factual circumstances of the employment relationship implicate the governmental operations of a mission does the United States consider asserting sovereign immunity. See Mukaddam Statement of Interest, *supra*, at 21-22. United States practice, then, supports the precise approach taken by the courts below here: careful consideration of the specific facts of the particular employment relationship to ensure it is commercial and not governmental in nature, in the context of a general assumption that immunity will not be appropriate absent some close relationship between the claim and the mission's sovereign functions.

The consistency between the decision below and the United States' view of its own sovereign immunity – and with the United States' construction of the FSIA exception in the employment context – confirms that the decision below is a routine and appro-

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[9] See also Letter from Office of the Legal Advisor, Diplomatic Law and Litig. Div., U.S. Dep't of State 3 (Oct. 23, 1990), *available at* http://www.state.gov/documents/organization/28510.pdf ("Employment of local nationals by diplomatic or consular mission is generally deemed to constitute commercial activity"; the "Department does take the position * * * [that] claims for labor benefits or breach of contract money damages can generally be adjudicated by local courts.").

priate exercise of jurisdiction.[10]

II. The Courts Of Appeals Are In Substantial Agreement Regarding The Application Of The Commercial Activity Exception In The Employment Context.

Petitioners argue (Pet. 27-31) that the lower courts apply different standards in determining the applicability of the commercial activity exception in the employment context. In fact, all courts assess whether exercising jurisdiction would improperly intrude upon the sovereign prerogatives of the foreign state. To make that determination, they engage in the very same factual inquiries. Although some courts have applied different labels to their analysis, and some may divide their analysis into separate stages, the analysis is essentially the same. Indeed, it is clear that each of the courts of appeals that has addressed these issues would have reached the same conclusion as the court below on the facts presented here. There simply is no conflict among the lower courts warranting this Court's attention.

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[10] Petitioners argue that the district court "effectively refereed" a dispute between various U.A.E. officials about respondent's "conduct and thus his fate." Pet. 10. But the court of appeals observed (Pet. App. 3a) that "[w]hy [respondent] was accused – for the record and the district court's opinion make clear that the accusation was baseless to the core – is a mystery." The lower courts did not attempt to ascertain the reasons for the accusation or to determine the reasons for the conflicting views of different U.A.E. officials. They addressed only the circumstances relevant to respondent's claim – the undisputed facts that the accusations were false and that respondent was discharged without cause.

A. The Courts Of Appeals Employ The Same Inquiries In Applying The Commercial Activity Exception To Employment-Based Claims.

The courts of appeals all distinguish "commercial" employment relationships from governmental ones on the basis of fact-dependent inquiries focused on four basic factors: whether the foreign employer considers the employee a "civil servant"; whether the employee is involved in governmental policymaking; whether the employee is a third country national; and whether the employee's activity has an analog in the private sector.

Of course, whether a court will assess a particular factor in a given case will depend on whether the factor is relevant in that factual setting. But each court applies a multi-factor standard that looks to the same fundamental considerations.[11]

1. *Civil Servant, Diplomatic, or Military Officer.* One factor that courts assess is whether the employee is a civil servant, diplomatic officer, or military officer under the foreign nation's practices and laws. Here, relying in substantial part on a letter from the U.A.E.'s cultural attaché, the court below concluded that respondent was not a civil servant under U.A.E. law. Pet. App. 12a-13a.

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[11] Petitioners inexplicably disaggregate the multiple factors that courts consider in these cases, isolating each to assert that consideration of that factor alone would "lead to preposterous results." Pet. 25. We agree, but no court employs petitioners' hypothetical single-factor approach. Rather, each looks to multiple factors in making the commercial activity determination. Petitioners' hypothetical analysis is not reflected in any decision and provides no basis for review by this Court.

Similarly, the plaintiff in *Holden* v. *Canadian Consulate*, 92 F.3d 918 (9th Cir. 1996), another case in which immunity was rejected, was not a civil servant because she "did not compete for any examination prior to being hired, was not entitled to tenure, was not provided the same benefits as foreign service officers and did not receive any civil service protections from the Canadian government." *Id.* at 921. The plaintiff in *Segni* v. *Comm. Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987), was permitted to pursue his case in part on the ground that he too was not a civil servant, because he was not sufficiently "supervised or monitored" by the Spanish government.

The Second Circuit, on the other hand, observed that an employee was "concededly a 'civil servant' under Japanese law" in a case in which immunity was upheld. *Kato*, 360 F.3d at 111.[12]

In *Butters* v. *Vance Int'l, Inc.*, 225 F.3d 462 (4th Cir. 2000), the only other appellate decision to consider the commercial activity exception in the employment context, the defendant was an American corporation that successfully asserted derivative sovereign immunity. Since the relevant foreign state was not the plaintiff's employer, the Fourth Circuit

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[12] While the Second Circuit in the particular case rested its decision on the determination that the plaintiff's employment activities were governmental and not commercial in nature, and thus did not rely on her civil service status to reach its decision, it nevertheless instructed lower courts on the proper way to consider the civil servant factor – making clear that this factor is relevant in the Second Circuit. See *Kato*, 360 F.3d at 112. ("[T]he category of 'civil service' should be interpreted to include the broad range of civil service employment relationships used by countries other than the United States.")

had no occasion to consider whether the plaintiff was a member of that state's civil service. It did not disclaim such an inquiry, however.

Petitioners contend (Pet. 19-20) that there is a conflict among the lower courts with respect to consideration of the civil service factor. But the court below stated that "like many of [its] sister circuits" it had held that employment claims involving civil servants, diplomats, and soldiers fall outside the commercial activity exception. Pet. App. 8a & 9a n.2. It went on to observe that – on the other hand – employment claims by individuals who are not civil servants, diplomats, or soldiers do not necessarily qualify for the exception, noting that such employees may nonetheless play a policymaking role. The court below did state that two other courts of appeals had either "suggested" or "assume[d]" that non-civil servants claims necessarily involved commercial activities. *Ibid.* But both of those courts look to the same factors as the court below when applying the commercial activity exception (considering them in connection with the civil service inquiry), and neither has denied immunity to non-civil servants exercising policy functions, demonstrating that the courts' approaches are similar in all material respects.

Petitioners also challenge (Pet. 20) what they characterize as the "[m]echanical" application of the civil service factor, but they do not and cannot contend that the courts in this case engaged in any such mechanical analysis. Instead, they complain only that the courts did not address "employment for life" as "*the* critical attribute of civil service under our system." *Id.* at 21 (emphasis in original).

Even assuming that U.S. civil service norms are pertinent to a determination of U.A.E. civil service

norms, however, petitioners point to nothing in the record establishing that for cause dismissal is associated only with civil service employment. In the trial court's thorough description of petitioners' arguments on this issue, no mention is made of either "employment for life" or its more correct characterization as for cause dismissal. Pet. App. 42a.

The trial court did address, and reject, petitioners' arguments that a "grade" salary system and competitive examinations support a finding of civil service employment: "a standardized grade/step salary system and a competitive qualifying examination are features of employment that are by no means unique to governmental civil service employment, but are common to employers engaged in private commerce as well." *Id.* at 43a. See also *id.* at 10a (discussing characteristic features of United States civil service). In the end, petitioners' argument is that the courts below reached the wrong conclusion with respect to the "civil servant" determination. But there is no reason that this Court should reevaluate that fact-bound determination.

2. *Political Deliberation and Policy Making.* Because employees engaged in policymaking should not expect the protection of U.S. courts in disputes with their own regimes, the courts of appeals look to whether the employee's duties included responsibility for the creation of government policy. The court below noted that "[o]ne distinctive mark of governmental work is discretionary involvement with sovereign law or policy." *Id.* at 18a. It also pointed out that respondent "lacked authority to determine or articulate policy * * *." *Id.* at 15a.

The same conclusion was reached by the courts in the other cases in which immunity was denied.

The plaintiff in *Holden* also "was not involved in any policy-making and was not privy to any governmental policy deliberations * * * did not engage in lobbying activity [and] could not speak for the government." 92 F.3d at 922. In *Segni*, the employee was not "so privy to [the Commercial Office's] political deliberations, as to be considered as a part of the Spanish government." 835 F.2d at 165.

3. *Third Country National.* "[A] person hired by his own country's government to work abroad should have a somewhat lesser expectation of suing his homeland in his host nation's courts." *Segni*, 835 F.2d at 165 n.7. Courts therefore examine whether the employee is a third country national. The court below, for example, considered whether "a foreign state can engage in noncommercial (i.e., governmental) activity through third country nationals." Pet. App. 16a (internal quotation marks omitted)). It noted that respondent was an Egyptian citizen employed by the United Arab Emirates. *Id.* at 16a-17a.[13]

Other courts also consider the employee's nationality. The court in *Segni* pointed out that "Segni is not a citizen of Spain" – the country that employed him. 835 F.2d at 165 n.7. The court noted in *Holden* that the employee was an American and, as such, "was not allowed in the Consulate unless in the company of a foreign service officer." 92 F.3d at 922. In

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[13] Because the U.A.E. regularly hires non-citizens, the D.C. Circuit ultimately concluded that "El-Hadad's nationality is all but irrelevant." Pet. App. 17a. But that court considers the plaintiff's nationality to be a relevant factor in general. "[T]he relevance of a plaintiff's nationality [is] * * * a matter of context." *Id.* at 16a.

Kato, where immunity was upheld, the plaintiff was a Japanese citizen suing the Japanese government. 360 F.3d at 109.

4. *Private Sector Analog*. All of the courts of appeals consider whether the employee's activities involve "powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360 (internal quotation marks omitted). See Pet. App. 17a; *Kato*, 360 F.3d at 111; *Butters*, 225 F.3d at 465; *Holden*, 92 F.3d at 920. See also *Segni*, 835 F.2d at 165 (a pre-*Nelson* case describing the need to "examine the nature of Segni's 'employment activities' in order to determine whether *they* are governmental or private") (emphasis in original)). Thus, common to every court's analysis is an inquiry into whether the employee is discharging peculiar sovereign functions or, on the other hand, is engaging in functions "of a character easily found in commercial enterprise." Pet. App. 18a.

For example, the court in *Butters* concluded that the hiring of a private security guard for a Saudi Arabian princess did not have an analog in the private sector, because the relevant act in the case, protecting a nation's leaders, is quintessentially an act "peculiar to sovereigns." 225 F.3d at 465 (internal quotation marks omitted). Similarly, the court in *Kato* found that the activities of a government marketing agent were "only superficially similar to actions typically undertaken by private parties" engaging in commerce, because a private party would not typically promote Japan's entire product base. 360 F.3d at 111.

Employment relationships in other cases do resemble commercial enterprise. In *Holden*, the Ninth

Circuit found that the plaintiff's work "promoting and marketing" Canadian products was of a type "regularly done by private persons." 92 F.3d at 922. Similarly, in *Segni* the Seventh Circuit concluded that plaintiff's employment as a "marketing agent" was "certainly an activity * * * in which a private person could engage." 835 F.2d at 165 (internal quotation marks omitted).[14]

Thus *Butters*, *Segni*, *Holden*, and *Kato* all considered whether there was a private sector analog, reaching different conclusions based on the facts of the three cases.

Petitioners' contention that the standards adopted by the courts are "irreconcilable" is thus incorrect. The standards these courts apply look to the very same factors. There simply is no conflict warranting this Court's attention.

B. This Case Would Be Resolved Similarly In Every Circuit That Has Addressed The Issue.

Petitioners also contend that "the courts have reached wildly inconsistent results based upon similar facts" (Pet. 27), citing in particular what they perceive to be tension between the *Segni* and *Kato* decisions (see *id.* at 27-29). But those two decisions

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[14] Petitioners do not contend that any court of appeals has rejected this factor; they assert only that determining whether the function in question has a private sector analog is "[n]ot [u]seful." Pet. 23. But that is the precise analysis specified by this Court in *Nelson* and, moreover, petitioners did not object to consideration of this factor below. Finally, petitioners' claim that consideration of this factor "would make immunity a rarity" (*id.* at 23) is undercut by *Kato* and *Butters*, where the courts of appeals relied on the private sector analog to *uphold* immunity.

clearly did *not* rest upon "similar facts." Indeed, though the legal standards applied by the two courts were similar, the circumstances of those cases differed considerably, only further emphasizing the fact-dependency of the inquiry in this area of the law.

The plaintiff in *Segni* was a non-civil servant, third country national employed by the Spanish government. The Seventh Circuit's decision in *Segni* recognized "the rule that the nature of a transaction for FSIA purposes may be divined by asking whether a similar agreement could have been entered into with a private party." 835 F.2d at 164.

The *Kato* plaintiff was a Japanese citizen and "concededly a 'civil servant' under Japanese law." 360 F.3d at 111. The Second Circuit based its conclusion at least in part on whether the defendants' activities "were typical of a private party engaged in commerce." *Ibid.*

Petitioners' contention that "identical factual scenarios result in irreconcilable decisions," (Pet. 4), is therefore plainly wrong. These differing results reflect the courts of appeals' different views of the particular facts of the two cases.

Most significantly, petitioners do not and cannot contend that the result here would be different in any circuit. That fact not only confirms the absence of a conflict; it also demonstrates that this case is a poor vehicle for addressing the question presented.

1. The court in *Holden*, for example, considered the "employment of diplomatic, civil service or military personnel" to be governmental "and the employment of other personnel" to be commercial. 92 F.3d at 921. Whether the plaintiff is a member of a

nation's civil service, diplomatic, or military personnel, however, depends upon the same factors considered by the D.C. Circuit: whether the employee is involved in policymaking, whether the foreign country considers the plaintiff a civil servant, and whether the employment relationship has a commercial analog. *Id.* at 921-22. Since respondent was not engaged in policymaking, was not a civil servant under U.A.E. law, and performed tasks similar to those performed in commercial enterprise, the Ninth Circuit would conclude that respondent's employment was commercial.

The *Segni* court would also resolve this case in the same way as the D.C. Circuit. That court stresses the "nature of [the plaintiff's] 'employment activities' in order to determine whether they are governmental or private." *Segni*, 835 F.2d at 165 (emphasis omitted). Because that inquiry turns on precisely the factors just described, the Seventh Circuit would likewise conclude that respondent's suit could proceed.

2. The facts here are plainly distinguishable from the two cases in which courts have held that the plaintiffs' claims fell outside the commercial activity exception. The court in *Butters*, for example, focused on whether the "relevant act" is "quintessentially an act 'peculiar to sovereigns.'" 225 F.3d at 465. That question depended on a key factor relied upon by the D.C. Circuit: whether the employment relationship is "the sort of action by which private parties can engage in commerce." *Ibid.* (citation omitted). Unlike the sovereign function at issue in *Butters* – the safeguarding of a national leader – respondent's auditing and accounting activities are plainly analogous to jobs performed in the private sector. The Fourth Circuit would therefore agree with the holding below.

The court in *Kato* would likewise conclude that the commercial activity exception applies to permit respondent's suit. That court looks to whether the employee is a civil servant and to whether the state "exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Kato*, 360 F.3d at 111 (citations and internal quotation marks omitted). While the plaintiff in *Kato* was "concededly a 'civil servant' under Japanese law," respondent is *not* a civil servant. Also, respondent was a third country national while the *Kato* plaintiff was a Japanese citizen employed by the Japanese government.

Furthermore, while the *Kato* employee's responsibility to promote all Japanese products did not have a commercial analog, respondent's auditing and accounting activities are indisputably commonly performed in commercial enterprise. The duties inherent to respondent's employment lacked the degree of discretion present in *Kato*. The Second Circuit would therefore reach the same conclusion as the D.C. Circuit.

In view of the absence of any conflict with respect to the application of the commercial activity exception to these facts, there is no need for review by this Court of the judgment in this case.

III. Diverse Results Across Varied Fact Patterns Is Perfectly Consistent With The Fact-Bound Nature Of The Commercial Activity Inquiry.

The fact-bound nature of the inquiry under the commercial activity exception provides yet another reason why review by this Court is not warranted here. Determinations whether particular activities

qualify as "commercial" are inherently fact-specific. Any standard generated by this Court would itself need to be quite general in order to provide for flexible application across diverse fact patterns. It is unlikely that this Court could provide guidance more specific than what already is available from the decisions of the courts of appeals.

Petitioners concede that "Congress purposefully ceded a 'great deal of latitude' to the courts to establish a standard for identifying 'commercial activities.'" Pet. 4. Courts must decide whether, in each case, the particular set of facts constitutes a "commercial activity." Congress's decision to forego a precise statutory definition underscores the difficulty this Court would have in crafting a rule providing additional guidance to the lower courts. With the relevant factors already agreed upon, the courts of appeals are much better situated to resolve the variety of different factual scenarios that arise.

If, however, this Court nonetheless concludes that it is possible to provide the lower courts with a more precise definition of "commercial activity," there are three reasons why it would not be appropriate to undertake such an effort in this case. First, this is one of only very few lower court decisions applying the "commercial activity" standard to employment-related claims. By addressing the commercial activity question in the context of the much more common, non-employment fact pattern, the Court would be better able to craft a more detailed "commercial exception" standard with wider applicability.

Second, this case differs from the vast majority of "commercial exception" cases in that it involves a foreign national – one of the classes of individuals expressly identified by Congress as likely engaged in

"commercial activities."

Third, petitioners did not argue below that the court of appeals had identified the wrong factual inquiries or that the district court should have been required to address other considerations. Rather, their contention was that the district courts erred in conducting the factual assessment directed by the court of appeals. That fact-specific contention provides no basis for revising the factual inquiries specified by the court of appeals.

IV. The Application Of FSIA's Commercial Activity Exception To Employment Claims Is Not Worthy Of This Court's Attention.

The miniscule volume of wrongful termination litigation under the FSIA demonstrates that the issue is not sufficiently important to warrant this Court's review. In the thirty-year history of the FSIA, there appear to have been fewer than twenty reported cases of wrongful termination involving the commercial activity exception. The relative dearth of litigation in this area shows that the issue lacks the practical importance necessary to justify this Court's attention.

The relative unimportance of the underlying issues is further reflected by the absence of amicus participation by the United States in this case. Petitioners contend that this case presents "uniquely profound" issues regarding "the internal affairs of foreign sovereigns." Pet. 13. If that were true, the United States would have participated in the extensive litigation below.

The United States regularly participates in FSIA litigation to "ensure the proper application of sover-

eign immunity principles." U.S. Br. as Amicus Curiae at 3, *Ministry of Defense* v. *Elahi*, 495 F.3d 1024 (9th Cir. 2007) (No. 03-55015). Concern about unwarranted judicial intrusions into the internal affairs of sovereigns is a chief motivation for such participation. See *ibid.* (addressing immunity issue to prevent the United States from "receiv[ing] reciprocal unfavorable treatment in foreign litigation").

The absence of an amicus filing by the United States – especially in view of the importance of the District of Columbia Circuit's interpretation of the FSIA, given the large concentration of diplomatic missions in Washington – provides further evidence that the issue in the case does not rise to the level of importance necessary to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

UNITED ARAB EMIRATES and
THE EMBASSY OF THE UNITED ARAB EMIRATES,

Petitioners,

v.

MOHAMED SALEM EL-HADAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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THE LOWER COURTS HAVE FAILED TO DEVELOP RELIABLE OR CONSISTENT STANDARDS FOR APPLYING THE COMMERCIAL ACTIVITY EXCEPTION TO THE FOREIGN SOVEREIGN IMMUNITIES ACT

Respondent's opposition to *certiorari* rests largely on the assertion that the standards for applying the Foreign Sovereign Immunities Act's "commercial activity" exception to employment disputes are too settled to warrant intervention by this Court. As Respondent sees it, the statute's terms are well defined (or at least broadly understood), the lower courts have adopted a consistent mode of analysis (albeit using varying terminology), and the divergent results reached in the lower court decisions construing the Act can all be attributed solely to nimble judicial treatment of differing facts. Opp'n at 12-13.

The cases simply do not support Respondent's optimistic assessment. As this Court has observed, the statute "leaves the critical term 'commercial' largely undefined." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992).[1] Thus, the text of the "FSIA provides

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1. *Accord Holden v. Canadian Consulate*, 92 F.3d 918, 921 (9th Cir. 1996) (turning to legislative history because of the "lack of a clear definition of 'commercial activity'"); *Mukaddam v. Permanent Mission of Saudi Arabia*, 136 F. Supp. 2d 257, 261 (S.D.N.Y. 2001)(court admitting that it had done "its best to define a term as to which Congress gave little guidance"); *see also* Joan E. Donoghue, *Taking The "Sovereign" Out Of The Foreign Sovereign Immunities Act: A Functional Approach To The Commercial Activity Exception*, 17 Yale J. Int'l L. 489, 499-500 (1992) ("FSIA supplies a tautological definition of 'commercial activity' . . . [yielding no] sound basis for determining whether a foreign sovereign state should be immune").

distressingly little guidance" as to how the general rule of immunity and the exception for "commercial activities" can be reconciled. *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1392 (5th Cir. 1985)(statutory text is "circular").

Without meaningful guidance from the text of the statute, some (but not all) courts have turned to "the [equally] troublesome language found in" in the House Report on the bill that ultimately became the FSIA. *Mukaddam v. Permanent Mission of Saudi Arabia*, 111 F. Supp. 2d 457, 465 (S.D.N.Y. 2000). The Ninth Circuit has gone so far as to embrace the House Report as if it *were* the statute:

> [Because of] the FSIA's lack of a clear definition of "commercial activity" . . . [w]e *adopt the standard suggested by the legislative history*. . . .

Holden, 92 F.3d at 921 (emphasis added).

The D.C. Circuit, on the other hand, has resolutely insisted that

> [T]he language that must control our decision is that of the statute rather than of the somewhat muddy legislative history.

El-Hadad I, 216 F.3d at 33.

Although Respondent reassures the Court that FSIA employment cases pose no particular problem for lower courts, these opinions and others expose deep inter-circuit conflict. In the Ninth Circuit, where the language of the *legislative history* controls, immunity attaches *only* if the job performed by the plaintiff-employee fits within one of the three categories specified in the House Report (military, diplomatic, or civil service employment). No other type of employment relationship can qualify for immunity. In the D.C. Circuit, however, immunity is always available if the job at issue fits into one of these categories, but the job need not necessarily fall into one of these categories for immunity to attach.

But the division of authority is much broader even than the foregoing suggests. The D.C. Circuit concluded that, as a matter of law, a foreign nation does not engage in a "commercial activity" when it employs a "civil servant." Pet. App. 9a ("if El-Hadad is civil servant, our analysis stops for we have determined that the U.A.E. is immune from his suit."). The court acknowledged, however, that the "Second Circuit treats the civil service question as quite secondary ('merely [an] example[]' to be used, if at all, only to aid in making the 'central' commercial/governmental distinction')." Pet. App. 10a, *quoting Kato v. Ishihara*, 360 F.3d 106, 111 (2d Cir. 2004). The D.C. Circuit understood what Respondent denies, *i.e.*, that a circuit split exists. Pet App. at 9a ("Not all circuits approach these questions as we do.")

Whether civil service status is treated as conclusive, as in the D.C. Circuit, or is "quite secondary" to the analysis, it is also apparent that the lower courts cannot agree as to what "civil service" means in this context or even agreed upon the source to which one might turn to identify the characteristics of "civil service." Some courts appear to look to the characteristics of civil service as they have developed in *this* country,[2] others seem to defer to the way in which that term is used in the foreign nation at issue.[3] In this case, the immunity question turned in the first instance on the court's conclusion that Respondent was not a civil servant, but that could hardly have been surprising given that "the UAE does not have a [regulatory] definition of 'civil service,' . . . no such designation appears to exist [under UAE law], and . . . the UAE does not distinguish between employees paid by the government by categorizing them as civil service employees, governmental employees, or civilian employees." Pet. App. at 12a-13a.

Moreover, the House Report — elevated to the status of statutory text in the Ninth Circuit and often used as the basis for decision in many other courts — treats the distinction between "clerical" or administrative employees, on the one hand, and "civil service" employees on the other as mutually exclusive characteristics in a binary world: the employment of "clerical" employees, according to the House Report is

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2. *See, e.g., Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations*, 111 F. Supp. 2d 457, 463 (S.D.N.Y. 2000).

3. *See, e.g., Kato v. Ishihara*, 239 F. Supp. 2d 359, 363 (S.D.N.Y. 2002), *aff'd*, 360 F.3d 106 (2d Cir. 2004).

always "commercial," and conversely the employment of "civil service" employees is *always* non-commercial. And yet, as the D.C. Circuit observed below, the "civil service" system in this country *includes* "clerical" and administrative employees. Pet. App. 10a. The House Report's taxonomy simply does not work as a proxy for statutory text. With no answer for this conundrum, Respondent's brief is simply silent on the point.

Similarly, Respondent endorses a mode of analysis based upon a search for "private sector [employment] analogues"; if the work done by the plaintiff-employee is or was "of a character easily found in commercial enterprise," the employment relationship is commercial and no immunity attaches. *See, e.g.*, Opp'n at 26, quoting Pet App. 18a.[4] Respondent, however, does not deal with the indisputable fact that the federal civil service classification system in this country is largely populated with positions that are indistinguishable from every-day private sector jobs. *See* discussion at Pet. 23-24. More tellingly, Respondent is silent as to the undisputed fact that entire civil service classifications are populated with auditors who do work very much like that he performed at the Embassy of the United Arab Emirates.

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4. Respondent claims that this factor is "common to every court's analysis," but that simply is not true. In the Ninth Circuit and the D.C. Circuit, the employment of "civil servants" — however that phrase might be defined — is always immune, even if the job is identical to work found in the private sector. Thus, Respondent's assertion can only be true if the phrase "civil service" is defined to exclude *every* job that is "of a character easily found in commercial enterprise." As explained in the petition, the opposite is true. Pet. 23-24. Respondent is silent on this point as well.

Finally, Respondent endorses the view adopted by some courts that immunity in employment cases ought to be limited to instances in which the plaintiff's job involved "policy making." Opp'n at 24-25. As the petition pointed out, as a practical matter, this would reduce the statutory *general rule* of immunity to a largely irrelevant exception. In most embassies, there are unlikely to be significant numbers of policy-making non-diplomatic personnel; if the *general rule* of immunity is applicable only to those who make policy, the "civil service" aspect of the House Report becomes a dead letter.

To his credit, Respondent does not run from the far-reaching consequences of this position. Rather, he candidly acknowledges that, in his view, the statutory *general rule* of immunity should be applied only in those "rare cases" where the work of the employee at issue "implicate[s] the governmental operations of [the] mission" or Embassy, *i.e.*, where the plaintiff-employee "had [a] role in the creation of government policy" Opp'n at 15, *quoting* decision below, Pet. App. at 18a.

Not surprisingly, the disparate, internally inconsistent, and often conflicting approaches developed in the lower courts have resulted in decisions that cannot be reconciled. Both *Segni v. Commercial Office of Spain*, 835 F.2d 160 (7th Cir. 1987), and *Kato* involved individuals hired by foreign nations to promote their goods in the American marketplace. Neither plaintiff was a U.S. citizen, nor was either involved in governmental policy deliberations, but Segni's employment relationship was commercial; Kato's was not. Although Respondent insists that this difference in outcomes can be attributed entirely to the "fact-bound nature of the commercial activity inquiry," Opp'n at 30, he makes no attempt to

identify *which* differing facts might account for this difference in result. Respondent tells us that these results can be harmonized, but he has not attempted to harmonize them for the Court.

Moreover, even when a plaintiff is held to have been employed in a commercial job, immunity attaches unless the cause of action itself is "based upon" that commercial activity. *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993); *Holden*, 92 F.3d at 920. Thus, as this Court held in *Nelson*, the immunity inquiry requires the court to analyze each of the elements of the plaintiff's cause of action. It is not sufficient for the lawsuit to have some factual connection to the employment relationship; proof of the elements cause of action must require proof of the employment relationship. Respondent again insists that the courts below understand this requirement and therefore that there is no cause for Court intervention. Opp'n at 17 n.7.

Respondent is again mistaken. Consider, for example, the two causes of action at issue in this case, breach of contract and defamation. Although a court might plausibly conclude that the elements of the breach-of-employment-contract cause of action and the facts underlying the "commercial" nature of the employment relationship are sufficiently allied to satisfy the *Nelson* test, the defamation claim would almost certainly require a different outcome. The elements of a claim of defamation do not require proof of an employment relationship. While the facts of his discharge provide the *context* for the statements he claims to have been defamatory, that relationship forms no part of the elements of the cause of action. As *Nelson* explained,

the "only reasonable reading of the [statute] calls for something more than a mere connection with, or relation to, commercial activity." *Nelson*, 507 U.S. at 358.

The court below, however, simply refused to undertake this analysis. It declared that it would "focus [its] commercial activity analysis on the employment relationship between El-Hadad and the U.A.E. embassy as a whole, rather than narrowly on El-Hadad's termination alone or separately on El-Hadad's termination and defamation." Pet. App. at 7a, n.1. The undefined terms of the statute, the "muddy" legislative history, and the lack of guidance from this Court in employment –related FSIA cases lead the court below to misunderstand the nature of its task.

* * * *

This Court and Congress have both recognized "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003), *quoting*, H.R. Rep. No. 94-1487, at 32, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6631. Indeed, the FSIA was envisioned by Congress to be a remedy for the confusion caused by the pre-existing system for determining sovereign immunity, a system in which "the governing standards [for sovereign immunity] were neither clear nor uniformly applied." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1983).

Congress' legislative "solution" to that problem — the FSIA's general rule of immunity and its "commercial activity" exception — has provided none of the anticipated clarity. Congress expected the courts to develop easily understood standards for identifying "commercial activities" that would provide foreign nations and those with whom they interact a basis for reliably ordering their affairs. The resulting case law, however, is characterized by unpredictability, not certainty; the lower courts are hopelessly confused as to when to apply the general rule and when to apply its exception. Only this Court can provide the needed clarity.[5]

5. Respondent also finds it significant that the United States expressed its views in the district court in *Mukaddam* but failed to do so in this case. Opp'n at 32-3. The United States submitted a brief in *Mukaddam* in response to an explicit request from the district court; no such request was made in this instance. Moreover, the government did not participate in the lower court proceedings in *Nelson* or in *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 425 U.S. 682 (1976), or in *Weltover*; the Court nonetheless found the issues presented in those cases worthy of review.

CONCLUSION

For the foregoing reasons and those given in the petition, the writ of *certiorari* should be granted.

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